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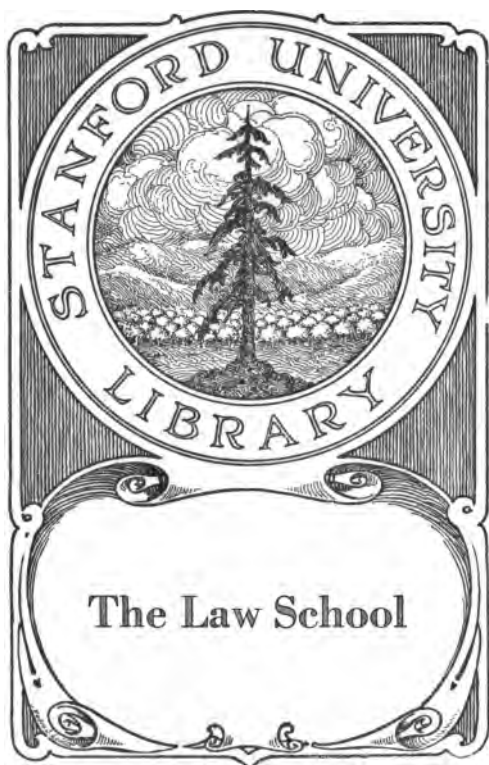
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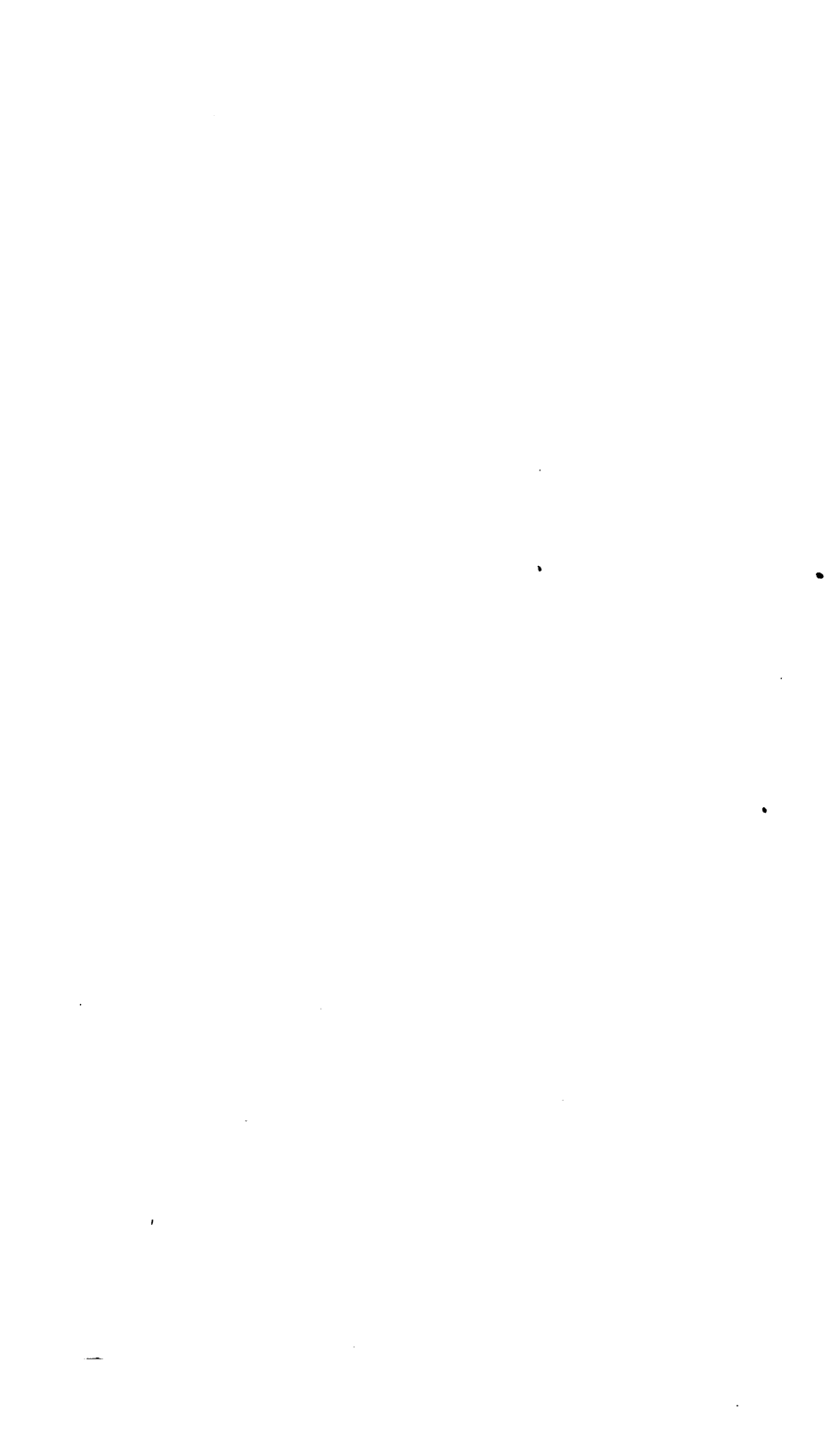
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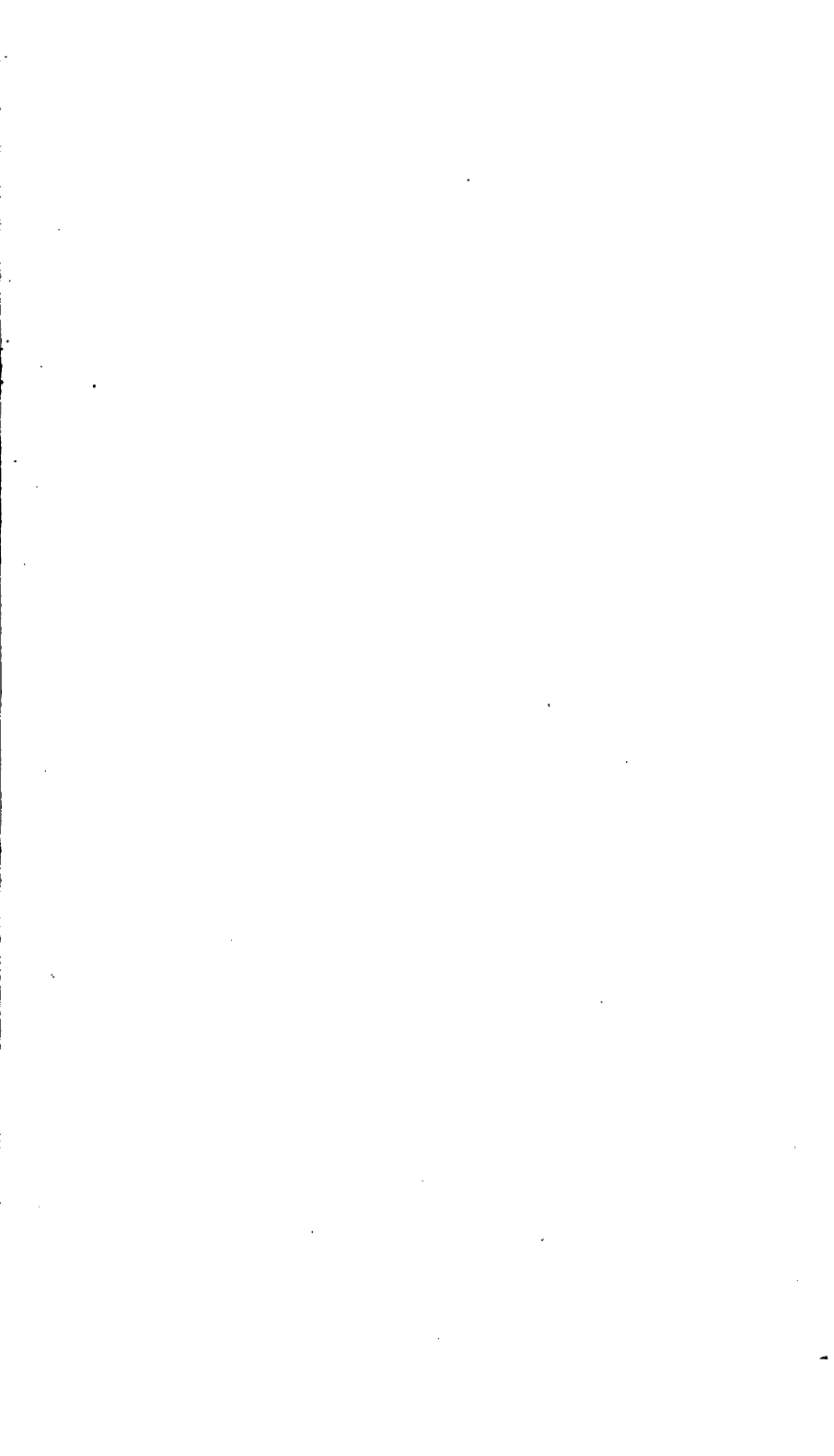
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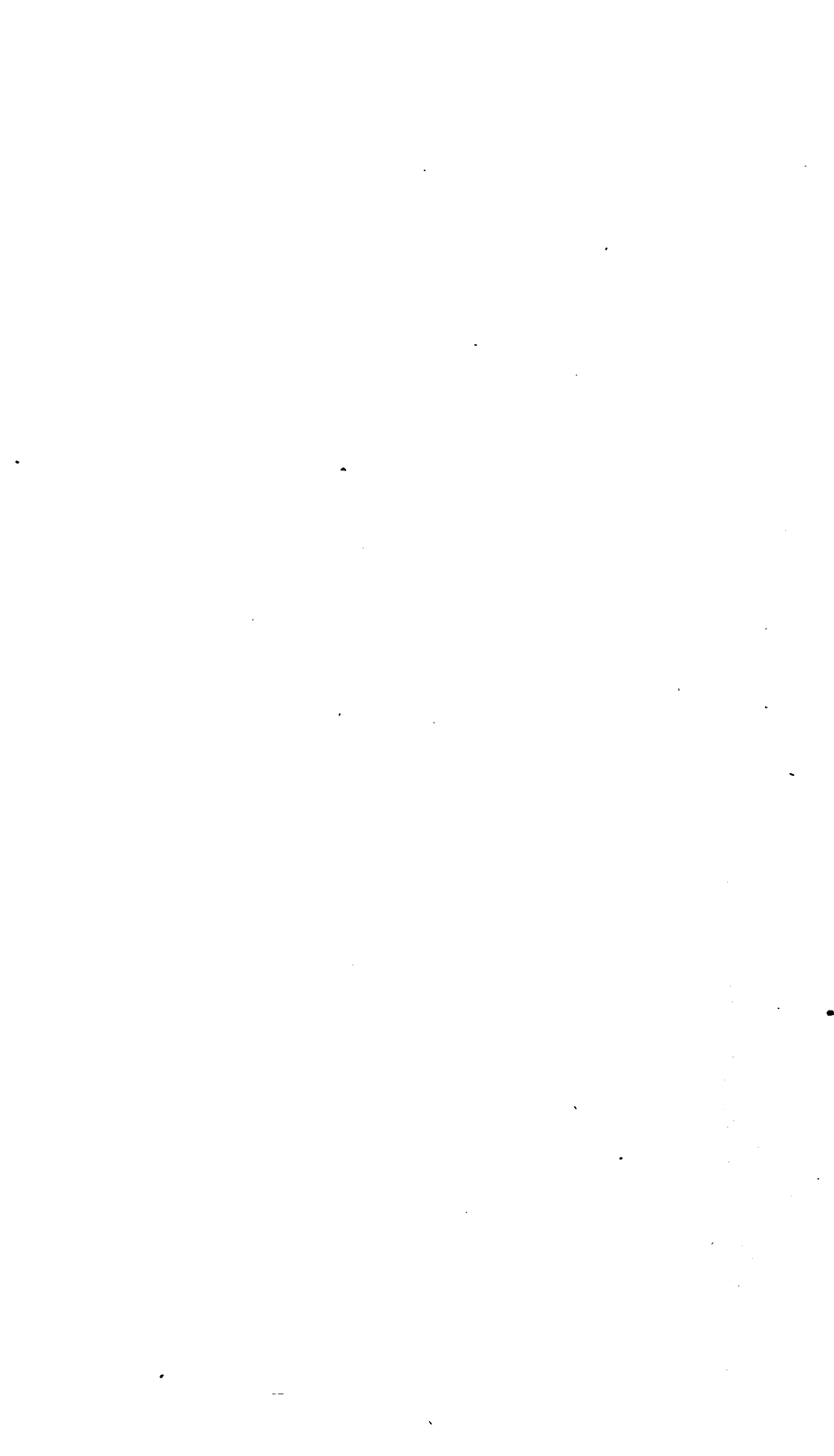
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WITH
AN APPENDIX
ON THE DISTRIBUTION OF THE PERSONAL
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OF LINCOLN'S-INN, BARRISTER AT LAW ;

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IS INSCRIBED,

AS A TESTIMONY OF RESPECT,

BY HIS MOST FAITHFUL

AND OBLIGED FRIEND AND SERVANT,

THE EDITOR.

THE
EDITOR'S PREFACE.

THE liberality, or as I ought perhaps rather to say, the kind indulgence which I have experienced from the profession and the public at large, with regard to the new edition of the late Mr. Watkins's Treatise on Copyholds, induces me to hope that the new edition which I now offer them of the same learned Author's Essay towards the further Elucidation of the Law of Descents, conducted as it has been on precisely the same plan, may meet with a similarly favourable reception.

From the nature of the work, and the circumstance of a Second Edition of it having been published under the immediate superintendence of the Author

EDITOR'S PREFACE.

himself, it was not, of course, to be expected that any very great room should have been left for either alteration or correction on the present occasion. On an examination of the Author's papers, however, it appeared that some improvements of this description had occasionally suggested themselves to him; and the reader may rest assured that, in the present edition, every alteration and correction which those papers were found to supply, has been made with the most exact and scrupulous fidelity.

To have meddled in any degree with the body of the work, except under the sanction of such express authority, would have been to engage in a task of the utmost delicacy and peril, and one to which I could not but be sensible that I was by no means competent. With respect, however, to Additions in the way
of

EDITOR'S PREFACE.

of Note, I did not feel myself under a similar degree of restraint, inasmuch as a clear line of distinction could here be drawn, so as to preclude every possibility of the Author's reputation being brought into the slightest jeopardy by any inadvertence or misconception of my own. I have therefore ventured to add a few Notes, comprising the substance of all the cases connected with the Law of Descents that have been determined subsequently to the Author's decease, taking care, however, to have such additions in every instance distinctly pointed out, by being included within crotchets.

That some errors of the press should not have found their way into a work containing such a multiplicity of references was scarcely to be expected; it is believed, however, that the reader will not find reason to complain of their being either
numerous

EDITOR'S PREFACE.

numerous or of any material moment. A few inaccuracies of this sort, together with some trifling omissions, will be found noticed at the end of the Table of Contents ; and for any others, I am persuaded that I cannot do better than again throw myself on the candour and generosity of a profession at whose hands I have already experienced such an abundant measure of indulgence.

13th October, }
1819. }

ROBERT STUDLEY VIDAL.

THE
AUTHOR'S PREFACE
TO THE
SECOND EDITION.

THE Author of the following pages, when considering the doctrine of Descents, was frequently involved in difficulties which he was not able to remove, or by any means to satisfy himself with respect to, from those Treatises which were expressly dedicated to the investigation of that important subject; and more especially with regard to the descent of reversions and remainders expectant upon estates of freehold: he therefore found that his sole resource was patiently to turn over the pages of miscellaneous authors, and to collect, out of the profusion of matter scattered through the several volumes he perused, the particular passages which
related

AUTHOR'S PREFACE.

related more immediately to those points; and, by adding some remarks as he went along, to illustrate what he thought was obscure, or to connect the several passages he selected or referred to, to digest, in some degree, to regular method, the chaotic mass, and form a concatenation through the whole. He pursued the scheme; and such was *the origin* of the ensuing sheets. As to *the execution* of the design, it is not *his* province to pronounce. All he shall say is, that he hopes the reader will not expect in such collection the *ne plus ultra* of investigation, or in those observations a professed treatise on the subject; but to remember that they are no other than a collection of a few authorities thrown together with a few remarks, with a design originally to satisfy his own doubts, and not urged by a presumption of being capable of yielding instruction to others. However, from the approbation which
some

AUTHOR'S PREFACE.


some have been pleased to express of them, and in the hope that they may save to others the trouble which he has experienced, he is influenced to submit them to the public eye; and should they throw any further light on so truly interesting a subject, the Author would feel himself ineffably happy in being in the least instrumental to the elucidation of a doctrine so important and extensive in its consequences.

As these sheets were not designed as a regular treatise on the subject, but merely to assist the Author in his researches, and to have recourse to for the purpose of directing him at once to the several books in which the points he has collected might be found, when the hurry of the moment would not permit him to hunt his subject through volume after volume, he has been frequent in his references; and has sometimes,

AUTHOR'S PREFACE.

times, perhaps, added observations and allusions which some of his readers may possibly think foreign to his pursuit: but as the intention of the work is thus explained, and as he has found those observations and allusions frequently useful to himself, he imagined that they might sometimes prove so to others; and as they would take up but little room, he has suffered them to remain.

The approbation bestowed upon the former edition, has induced the Author to correct and to enlarge the work; and he hopes, that, in the present edition, he has made it more extensively useful.



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AN
ESSAY
ON THE
LAW OF DESCENTS.

CHAP. I.
OF THE SEISIN OF THE ANCESTOR.

SECT. I.
Of the Necessity of an Actual Seisin.

ANCESTORS, from whom hereditaments can be derived by descent, may be divided into those who have taken immediately by purchase, and those who have, themselves, succeeded by descent to the hereditaments claimed.

Descent and purchase.

B

There

There are, indeed, other methods of acquiring an estate in lands and tenements, to which estate the heirs of the person so acquiring may inherit; but, in compliance with the usual mode of division, estates are here considered as being taken either by descent or purchase: yet, though such division is thus followed, it must, nevertheless, be remembered, that it is by no means accurate. But positions of this kind are too commonly adopted implicitly; and writers, "copying each other from generation to generation," without sufficiently attending to the nature, the causes, or the consequences, of a particular rule, are often led to apply it to things which it was not originally intended to embrace, and embarrass themselves and their readers in endeavouring to subject them to it.

The rule we are speaking of is thus frequently applied to matters which are absolutely without its view, as it applies only to *the rightful estate of the tenant*, as tenant; or, in other terms, it is expressive

the modes by which the law enables him to take such estate. Nor does it, indeed, apply unexceptionably to him (*a*).

It has nothing to do with disseisins, Disseisin, &c. abatements, &c. (*b*), which are estates [2] gained by wrong (*c*). For when an estate so gained *descends* to the heir of the disseisor, &c. the estate so taken by the heir is presumed to be a rightful one until the

(*a*) See *post.* ch. 5. p. 156. of a remainder to the heirs of the body of a person who takes no estate himself; in which case the heirs take neither by descent nor purchase.

(*b*) *Co. Litt.* 3. b. 18 b. *Plowd.* 47. b.

(*c*) And note; an estate gained by wrong is always a *quasi* fee. For wrong is unlimited, and not contained within rules; as if a tenant for life be disseised, the disseisor gains a fee; so the usurpation of an advowson gained the fee at common-law, and now does so in all cases to which the statute of Westminster II. does not reach. *Hob.* 322—3. *Elvis v. Archbishop of York*, & *al.* 5 *Com. Dig.* 447. *Seisin* (F. i.) 9 *Vin.* 81. *Disseisin.* (A. 2.) 105. (I.) *Gilb. Ten.* 119. & *Watk. N.* xxi. p. 371. *Co. Litt.* 277. a. 296. b. N. (1). *Bro. Estates*, 17. 41.

See also *Co. Litt.* 3. b. 18. b. 153. b. 257. b. *Litt. S.* 279. & *Co. Litt.* 186. 1 *Burr.* 111. *Taylor & Atkins v. Horde*, & *post.* S. 3.

contrary be shewn ; and the entry of the disseisee would, at common-law (*d*), have been tolled by such descent, for the title of the heir is ostensibly just ; and the law, on the succession of the heir, does not inquire into the title of the ancestor.

Escheat.

Again ; it reaches not to the estate of the lord, as lord, *i. e.* when he takes by escheat (*e*). For, as to the estate which he holds of his superior, whether the lord for the time being obtained such estate by descent or purchase, he must be considered as a tenant ; but relative only to the estate held of himself, can he be considered as lord. If he, therefore, takes by escheat, he is without the rule.

When the lord granted an estate, the portion of his property, to another and his heirs, the grant, on the failure of such heirs, necessarily ceased, and the lands returned to the lord. He, therefore, had

(*d*). See *Stat. 32 Hen. 8. c. 33.*

(*e*) *Vide Mich. 37 Hen. VI. pl. 1. Co. Litt. 18. b. & N. (2) Harg. 2 Bl. Comm. ch. 15. p. 244.*

a kind

a kind of reversionary interest (*f*); though, from the same narrow way of thinking, we frequently conceive that such reversion cannot exist.

But the maxim that a reversion cannot be expectant upon a fee, ought not to be applied in this case. A tenant having only a fee-simple himself, if he grant over that fee-simple to another, he, certainly, can have no reversion, as there is nothing left in him. But the estate of the lord is to be considered upon different principles: the tenant has not his estate absolutely for ever, but provisionally only, *i. e.* as long as he shall have any heirs existing; and, consequently, as this is not an absolute estate, a reversionary interest, or, however, one of that nature, must still be in the lord. When an estate is given to a person and the heirs of his body, the reversion continues in the donor. As the special heirs may fail sooner than the general

(*f*) 1 *Sir Wm. Blackst. Rep.* 133. 163. 2 *Bl. Comm.* ch. 15. p. 244. And see the form of the writ of *escheat* in the REGISTER, & *F. N. B.* 144. E. F.

ones, it is regarded as a less estate; and, consequently, there may be a reversion expectant on it. The donor has a larger estate than the donee, because a failure of issue is much more likely to happen than a failure of heirs. The lord has a higher estate than a tenant in fee, because the fee is determinable on the failure of the *tenant's* heirs; whereas his own estate is not so determinable (g).—And here, again, the estates of the lord and tenant in fee differ. Upon a grant in fee, the lord gave *a portion of his estate*; but on a feoffment, the tenant transfers *his whole interest*. He does not, since the statute (h) *Quia Emptores Terrarum*, leave any thing in himself, but puts the grantee in his own place to all intents and purposes. To say that an estate in fee must last for ever, is

(g) As an estate for one's own life is greater, in consideration of law, than an estate *pour autre vie*: thus, if A. be tenant for life, with remainder over to B. for life, and A. grant to B. for the life of B., A. will have a reversion left in him. See *Co. Litt.* 41. b. 42. a. *Bro. Est.* 67. *Fitzh. Abr. Dower.* 55.

(h) See *Co. Litt.* 269. b. *Watk. N.* xxxvii. & lvi. to *Gilb. Ten.* p. 391. 400.

improper,

improper, as the failure of heirs thus determines it; it may, indeed, by possibility do so, and so may an estate-tail (*i*); and yet a reversion is allowed upon the latter estate.

But there is another objection which may, perhaps, be thought to carry greater force, which is this; as the reversion, if it be one, is expectant upon an estate in fee, there can be no mesne seisin of it: and if so, how can it go, as it evidently must, to whoever has the manor or seignory, in exclusion of the half-blood? But this objection, however plausible, is, certainly, not justly founded. The descent of this interest differs essentially from that of the reversion of the tenant. The one, indeed, can be no more the subject of an actual seisin than the other. But here the cases differ. The tenant has nothing to which the reversion can attach; and, consequently, the descent must be ruled by its own seisin. The reversion of the lord

(*i*) 10 Co. 44. a. Jennings's case. Doug. 324.
Davie v. Stevens, 1 Pr. Wms. 366.

is not self-subsistent, but attached to his seigniority ; it is, as it were, an incident or appendancy to it, and, therefore, shall follow it as its principal (*k*).

But when lands actually fall, the lord, in order to complete his title to the premises so escheated, ought absolutely to enter or bring his writ of escheat ; for if he neglect to enter or to sue out his writ, or if he do any act which may amount to an implied waivure of his right, *his* title by escheat will be barred (*l*).

The embarrassment of several authors, in endeavouring to bring the title by escheat within the rule, is evident also from this ; their being sometimes driven to consider the lord as an assignee of the tenant, or as *ultimus hæres*. Now, as the lands cannot possibly escheat until the estate of the tenant be absolutely expired, there

(*k*) See 4 Co. 11. a. &c. Bevil's case. *Harg. N.*
(2). to Co. *Litt.* 18. b. & *post.* S. 4. p. 86.

(*l*) 2 *Blackst. Comm.* ch. 15. p. 245. See Co. *Litt.*
268. a. & b. and *F. N. B.* 144.

can be nothing to assign ; nothing to be inherited.

Yet, notwithstanding what has been said, as I intend, at least principally, to speak of descents as they relate to common individuals, or tenants (as such) only, I think the usual division of estates into such as are acquired by descent or purchase, sufficiently correct for my present purpose.

If a person takes immediately BY PURCHASE, and the hereditaments purchased be corporeal, he generally, and indeed always if the instrument by which they are conveyed is founded upon feodal principles, at the same time acquires or receives the corporeal seisin or possession. If they are incorporeal hereditaments, and especially if they are reversions or remainders, whereof no such corporeal seisin can be had, then the property therein, whether it be vested in possession, or in interest only, or merely contingent, is fixed or settled in such purchaser, at the time of such purchase made.

Ancestor taking by purchase.

[3]

But

[4] But, whether the hereditaments purchased be corporeal or incorporeal, or in possession or reversion, yet, on such purchase being completed, and the property in them being transferred, such purchaser immediately becomes the stock of descent, and the hereditaments so purchased become transmissible to his own heirs.

Remainders
descendible.

And here it may not be improper to remark, that a remainder of inheritance, whether vested or contingent, is transmissible to the heirs of the person to whom limited (*m*), equally with an estate which
is

(*m*) See *Fearne on Contingent Rem.* 286. (3d. edit.) and vol. i. p. 534. (4th edit.) [364. 5th edit.] 1 *Vesey*, 47. *Hodgson v. Rawson*, 237. *Peck v. Parrot*. 2 *Ves.* 119. *Exel v. Wallace*, and note †. 2 *Atkins*, 621. *Chauncey & al. v. Graydon & al.*

And, consequently, where such remainder is in fee, it shall escheat for default of heirs. *Bro. Ten.* 107. and see *ibid.*; *Prerogative le Roy*, pl. 251. and *Extinguishment*, pl. 3.

And the lord may maintain an action of waste, as the remainder-man might have done. See *Bro. ubi. sup.* and *F. N. B.* 58 G.

But he shall not have his writ of escheat during the life of the particular tenant; though he shall have a writ

is vested in possession. For it matters not whether there be, or be not, a capacity
in

writ of intrusion if a stranger enter on his death. *F. N. B.* 144. *B. Bro. Escheate*, pl. 6. & 22. *Waste*, pl. 40.

For a remainder is held of the lord (*Bro. Tenures*, pl. 107. *Prerogative le Roy*, pl. 25. and *Extinguishment*, pl. 3.) as well as a reversion, or particular tenancy. See *Dyer*, 137. pl. 26. *Bro. Esch.* 6. *Waste*, 40. *Gilb. Ten.* 88.

But note, this is confined to a remainder *in fee*; for a remainder *in tail* is held of the donor, and, consequently, cannot escheat to the lord of whom it is not holden. See *Bro. Esch.* 21. *Kitch.* 111, 112.

And if the tenant in tail enter, and die without issue, the donor shall have a writ of *formedon*, and not of *escheat*. *F. N. B.* 144. A. & 219. E. &c.

If the donor *grant* his reversion over to a stranger, the donee shall hold of such stranger. *F. N. B.* 219. E. 2 *Co.* 92. a. & b.

But if lands be given to A. in tail, with remainder in fee to a stranger, the donee shall hold of the chief lord; as, in this case, *the whole estate* is conveyed. *Bro. Ten.* 21. *Dyer*, 362. pl. 19. 2 *Inst.* 505. *Co. Litt.* 21. b.

If the tenant in tail has the reversion in himself, there, although the two estates continue distinct, yet, as he cannot hold of himself, the tenure of the estate-tail is suspended, and he is tenant to the lord in fee. See 2 *Co.* 92. b. *Bro. Ten.* 84. 107. *F. N. B.* 143. A. 144. A. *Dyer*, 236. pl. 22. 20 *Vin. Ten.* (H. a.) pl. 12.

And

in such REMAINDER of vesting in possession, if the possession were to become vacant ;

Relief.

And it seems that, if the person having the fee-simple have also the *possession* of the lands, though it be only in tail, he shall pay a relief to the lord on the descent of the fee. See 20 *Vin.* 252. Tenure. (H. a.) *pl.* 12. *Bro. Reliefe*, 2. *Fitzh. Abr. Reliefe*, 2. N. (a.) to *F. N. B.* 143. A. See *Dyer*, 252. *pl.* 22. 308. *pl.* 74. *Kitch.* 146. a. & b.

So where the tenant in tail holds, as such, of the lord, as where the remainder is over to a stranger, he shall pay a relief if he have the possession. *Kitch.* 146. b.

But if the person who so holds in fee or in tail of the lord, have *not* the possession, as if there be a precedent estate of freehold in existence, it seems that the relief is not leviable on the descent of such fee or entail, during the continuance of such precedent estate ; as if it be to A. for life, remainder to B. in tail, remainder to the right heirs of B. ; and B. die, living A. ; the relief shall not be levied in A.'s life-time. *Kitch.* 146. b. *F. N. B.* 143. A.

So it seems, if there be a grant to C. in tail, with remainder to D. in fee ; that C., being tenant to the lord, the relief shall be paid on the descent of *his* estate, and not on that of D. See before.

But if A. grant to B. in tail, and afterwards grant the reversion over to a stranger, so that the tenant in tail shall hold of such stranger, and the stranger hold over of the lord ; it does not appear clear, whether any relief is payable to the lord on the descent of the
reversionary

cant; (for in either of these cases it shall be descendible;) but if a remainder be limited so as to be contingent *as to the PERSON* to whom it is limited, here, while there is a want of capacity in such PERSON to receive it, during such contingency, the remainder cannot possibly be inheritable; for as there is no person who can take, there is no person from whom it can be derived (n). [5]

So also with respect to executory devises : if, or so soon as, there is a person Executory
devises.

reversionary fee during the continuance of the estate-tail; there being no tenant to the lord entitled to the possession. Yet, *quare*; as by this mean, the lord may be defrauded of his relief. See *Keilw.* 83. b. 84. a. & b. & N. (1) to *Co. Litt.* 91. b.

As a tenant in tail shall hold of the donor as the donor holds over, it should seem that the donor should pay his accustomed dues and services, and that the donee should reimburse him, to the end that the lord of the seigniorie should not lose his rights. See *Moore*, 890. pl. 1253. Rivet's case. *Gilb. Ten.* 173.

And we may here remark, that a possession *in law* only, is sufficient to entitle the lord to his relief. See *post*, 26. N. (f).

(n) See 1 *Fearne*, 534. 545. (4th edit.) [364. 371. 5th edit.]

capable

capable of taking the expectant fee, should the anterior one happen* to determine; then, or so soon, it is so far vested or fixed (*o*) in such person as to become transmissible to his heirs in a regular course of descent (*p*).

Possibilities.

So, also, as to mere possibilities; they are descendible to the heirs of the persons entitled to them, in the same manner as remainders or executory devises (*q*).

And

(*o*) *Lord Chancellor Talbot*, when speaking of an interest of this nature, said, "It does not indeed *absolutely vest*, because the contingency may never arise: but it is carrying it too far to say *that it does not vest at all*." And, accordingly, he decreed that it *DID VEST in such manner as to become transmissible to the representatives of the person entitled. Cases Temp. Talb. 123. King v. Withers; and see 2 Vesey, 119. note †. and Fearne, 160. (p. 341. vol. i. 4th edit.) [224-5. 5th edit.]*

(*p*) *Fearne, 444. (3d edit.) [552. & seq. 5th edit.] See 1 Ves. 411. Wright v. Wright. 2 Ves. 119. and note †. Forrester, 121. King v. Withers. Post, ch. iii. sec. 2. See 3 Durnf. & East. 88. Jones & al. v. Roe, lessee of Perry; and 2 Burr, 1134. Selwyn v. Selwyn. 5 Brown's Cases in Parl. 388. Wilson v. Bayly & Ur.*

(*q*) *See 1 Strange, 131—6. Marks v. Marks. 2 Atkins, 618. Chauncey v. Graydon. Forr. 123—4.*

King

And therefore, in the case of A PUR-
 CHASER, the question is, Whether the
 property intended to be conveyed, limited,
 or transferred, of, or in, such heredita-
 ments, WAS LEGALLY VESTED OR FIXED
 in such purchaser; or whether he was ever
 capable of taking such future interest dur-
 ing the continuance of the particular es-
 tate or anterior fee, should it chance to
 have determined or fallen? And *not*,
 Whether he ever had THE CORPOREAL
 POSSESSION of those which are corporeal,
 OR WHAT IS TANTAMOUNT THERETO in
 incorporeal heraditaments? (as receipt of
 rent, presentation to advowson, &c.) For
 in many cases, if such property be fixed
 BY PURCHASE, though the ancestor so pur-
 chasing had never gained any *actual* sei-
 sin (*r*), yet his heir may inherit.

First pur-
 chaser.

[6]

Fixture of
 property.

King v. Withers. 2 *Blackst. Comm.* 290. ch. xix.
Fearne, 444. (3d edit.) [552. & seq. 5th edit.] 3 *Durnf.*
 & *East*, 88. Jones & *al.* v. Roe, lessee of Perry;
 and 2 *Burr.* 1134. Selwyn v. Selwyn.

(*r*) In fact; See the case of Geary v. Bearcroft,
Carter, 57. and *post.* 18. 52. *in not.*

By

Livery of
seisin and at-
tornment.

[7]

By the feodal law, indeed, an actual and corporeal investiture or seisin, or a regular attornment, was essential to give completion to a transfer of property ; but, at this day, by the introduction of conveyances unknown to that institution, at least when that institution had attained its maturity ; for devises of lands were certainly known in countries where, and at times when, that system was received, though that system was as certainly then in its youth (s): At this day, I say, such actual

(s) That devises were known in this kingdom in the time of the Saxons, see *Bacon on Eng. Gov.* b. 1. ch. xli. p. 68. fol. (edit. of 1739.) *Sullivan's Lect.* lect. xv. p. 145. 75th *Law of Canute, Tyrr. Hist. Eng.* b. 6. p. 60. vol. i. fol. *Lambarde's Peramb. Kent*, 441. 492. *Somner of Gavelk.* 84. Appendix, 197. 211. (edit. 1726.) *Robinson on Gavelk.* b. 1. ch. ii. p. 30. b. 2. ch. v. p. 234. 242. 2 *Blackst. Comm.* 373. ch. xxiii. See *Hale's Comm. Law*, 251—2. ch. xi. (Runnington's edit.) *Co. Litt.* 111. b. and note (1). *Powell on Devises*, 1.

Of the ori-
gin of the
feudal sys-
tem.

Laborious have been the researches into the origin of feuds, and many and discordant have been the hypotheses advanced: while some preposterously deny their establishment till the system had attained its perfection,

actual or corporeal seisin is, in many cases,
not indispensably necessary to the vesting
or fixing such a property in hereditaments
as

[8]

[9]

fection, others, from the analogy which several of the customs of barbarous nations bear to those of feudal usage, imagine they discover traces of this system in almost every state upon earth.

The polity of rude nations must have been simple, and such as their situation and necessities prompted, rather than the result of philosophical enquiry. All nations were originally rude: all nations had external enemies, and internal connections and dependencies. When population increased, they endeavoured to enlarge their borders. The wants and constitution of man urged him to society: society, as it conferred mutual benefits, required mutual aids. The idea of A PUBLIC OR A STATE at length prevailed. Subordination and rule were found absolutely necessary to the defence and well-being of society. When they had acquired new territories, they must have defended them; hence those who shared in the conquered lands, contributed to the general defence. Men, secure under the shadow of society, cultivated their polity, and ripened the suggestions of the moment into a regular system. Among a nation of savages there must have been freedom: "The chief of a petty plundering nation can never be despotic: the spoil is shared in common, and each individual defends his liberty as his own peculiar treasure. The first kings of Rome"

c

(says

as to make them descendible to the heirs
of A PURCHASER.

Thus

(says Voltaire,) "were like the captains of the Buccaneers." (1).

From circumstances thus similar, can we be surprised at similar usages? Hence the analogy between the customs of barbarous nations (2).

To illustrate this, let us advert to the decimal division of states. The celebrated division of this kingdom into counties, hundreds, and tythings, and the making each person in such tything answerable for his fellows, has been much and deservedly extolled for its wisdom, and generally attributed to Alfred. But such division seems to have been (at least in some measure, though, perhaps, not in its perfect establishment) prior to that immortal man.

The division of a state into less districts would be one of the earliest efforts of its civil polity (3). And we shall presently see the cause of such divisions being *decimally* made.

Some

(1) See 1 *Voltaire's Spirit of Nat.—Prelim. Disc.—Philosophy of Hist.* 428. and *Mall. North Antiq.* vol. i. ch. 8. p. 163—4.

(2) See pref. to *Mall. North Antiq.* p. ix. *Ferguson on Civil Society*, part. 1. ch. 1. and part 2. s. 1. and 2 *Robertson's Amer. B.* 4. N. lxii. *Squire's Anglo-Sax. Gov.* 8. 7. 11. x3. N. (6). 19. 20. 21. N. (3). 26. 27. 31. 32. 35. &c. *Macphers. Dissert. on the Caledon. Dissert.* xii.

(3) See *Whit. Hist. Manch.* b. 1. ch. 8. sec. 4. p. 369. *Nor. Antiq.* vol. i. ch. 8. p. 174. 181.

Thus livery of seisin was, by the common law, and still is absolutely essential to Feoffment. [10]

Some have supposed the origin of counties to have been from the government of the nations remaining in the conquered countries of Europe, who retained their lands in *allodio* (4). However, counties, and hundreds, and tythings also, seem much more ancient than the time of Alfred, and to have been common to the northern nations (5).

That they, or something very analogous to them, were known to the British and Celtic nations, is also clear (6). The Romans had, in very ancient days, their centurions, deans, &c. The Hebrews also had their rulers over thousands, over hundreds, over fifties, and over tens (7). The Germans and other gothic nations seem to have been acquainted with hundreds (8).

In

(4) See *Dalrymple on Feud. Prop.* 9. *Sullivan's Lect.* 51. 197. 245. *Spirit of Laws*, b. 30. ch. 17, 18.

(5) See *Mill. View of Eng. Gov.* b. 1. ch. 6. p. 118. b. 1. ch. 9. p. 177. *Fortescue on Mon.* pref. xxxii. and p. 112. *Sullivan*, 245. *Spirit of Laws*, b. 30. ch. 17. vol. ii. p. 376—7. *Bickn. Alf.* 204. note. Pref. to 3 Co. 7. b. and to 9 Co. 9. b. *Co. Litt.* 168. a. & b. and note (6). *Stuart's Diss. on the Engl. Const.* part 4. sec. 3. p. 250. & N. 5. *Squire*, §. 81. & N. (4). 83. 87. 2 *Rapin*, 154, &c. (8vo. edit.)

(6) *Whit. Manchester*, b. 1. ch. 8. s. 4. p. 370. and 1 *Warr. Wales*, b. 3. p. 185—6. (8vo. edit.) See *Squire*, *ubi sup.*

(7) See *Lowman*, c. 9. p. 162. and *Squire*, s. 20.

(8) *Whit. Manch.* b. 1. c. 8. s. 4. p. 370. 1 *Blackst. Comm.* 116. *Bacon on Eng. Gov.* b. 1. c. 25. See *Adair's Hist. Amer. Ind.* 15. and note. *Stuart's Diss. on Eng. Const.* pt. 4. s. 2. p. 229.

[11] to the completion of a feoffment: without it the deed was a mere nullity, and conveyed no property whatever to the feoffee; insomuch

In China a practice prevails nearly similar to our own division of hundreds and tythings: their towns are divided into four parts, (this, I presume, follows from the *form* of their towns, which is *square*) (9); and these into smaller divisions of *ten* houses each, &c. &c. (10). In Japan, they establish one out of every five heads of families as a magistrate over the rest (11). But what comes nearest to our own mode of division seems to have been that of Mexico and Peru. Peru was divided into small districts containing ten families each: five of these composed a higher class of fifty families; and two of these last composed another called an hundred: ten hundreds constituted the largest

(9) See *Mem. Acad. Scien. Paris*, vol. v. p. 296. *Hist.* 1718. art. vii. and see the *Code of Gentoo Laws*, ch. 14. p. 172—3. (8vo. edit.) and *Numb.* ch. xxxv. 5.

This form of towns was common in the East. Babylon and Damascus were squares: Nineveh a parallelogram.

And note; the Welsh had a *quadruple division*: thus, 4 *Erw* made 1 *Tyzyn*; 4 *Tyzyn* 1 *Rhandir*; 4 *Rhandir* 1 *Gavael*; 4 *Gaveal* 1 *Trev*; 4 *Trev* 1 *Maenawr*; 12 *Maenawr* a 2 *Drev* 1 *Cwmwd*; 2 *Cwmwd* 1 *Cantrev*.—*Owen's Welch Dict.* voce *Cantrev*. and see *Taylor on Gavelk*, c. vi. p. 96. &c.

Though, perhaps, this proceeded only from the general custom of dividing things into halves, and those halves into quarters.

(10) See *Le Compt's Hist. of China*, 291. See also, 2 *Rapin's Hist.* 157.

(11) *Spir. Laws*, b. 14. ch. 15.

insomuch that if the feoffee had died before livery, such livery could not be made to

[12]

largest division, consisting of a thousand families, &c. (12).

Most nations reckon by tens (13). The Athenians divided their city into ten parts or tribes, &c. The tithes or tenths were paid to kings, &c. by many ancient nations beside the Jews (14).

An

(12) See *Mod. Univ. Hist.* vol. xxxviii. p. 469. and vol. xxxix. p. 14. 3 *Blackst. Comm.* ch. 4. p. 31. And see *Of the Hindoo Divisions, Code of Gentoo Laws*, Pref. p. 115. & c. 17. s. 6. p. 230.

(13) The ancient *Scandinavians*, indeed, had a great respect for the number *twelve*; and from them seems the number of our jury to have been derived. It is observable, that we, to this day, reckon to twelve; but then we return to ten: we do not say one and twelve, but thirteen, and continue by *tens*. It is observable, also that our *score* consists of *two tens—twenty—twi ten*. And to our Saxon ancestors are we to attribute the custom of numbering to twelve. See further, *Nor. Ant.* vol. i. ch. 4. p. 61—65. ch. 7. p. 133—138. ch. 8. p. 169. ch. 13. p. 356. (note). and vol. ii. p. 7. *Edda, Fab.* 1. & note (A). and p. 41. & N. (C). *Fab.* vii. 3 *Blackst. Comm.* 349. ch. 23. and p. 365. and note (b). See also 3 *Roll. Anc. Hist.* b. 5. art. iv. and compare with *Mal.* c. 4. p. 58. and Pref. to *ibid.*

The Welch reckon to *ten*; and then they say *one* and *ten*, and not eleven; and so continue till *five* and *ten*, which answers to our *fifteen*. They then say *one* and *fifteen*, or *one, five*, and *ten*; and so on to *four* and *fifteen*; and then twenty, or a score; and so on till *ten* and *twenty*; *one, ten*, and *twenty*, &c. to *two twenties*: and continue by *twenties* or *scores*. It is observable, that their term for a hundred, or ten tens, is *cant*, which signifies, a complete series of numbers. See *Owen's Welch Dict.* voce *Cant*.

(14) See *Clayt. Chron. of Hebrew Bible*, 102. *Roll. Anc. Hist.* b. 2. part. 2. ch. 1. b. 6. ch. 2. art. ix. *Patrick on Gen.* xiv. v. 21. xxviii. v. 22. See 1 *Samuel*, ch. 8. v. 17.

[13] to his heir ; nor could he inherit without it (t). As the ancestor had no property in

An effect so general must have had as general a cause. The division of our own kingdom seems necessarily to have flowed from the then state of society prevailing among us ; the history of which associations in this island is deduced with great ability by Professor Millar (15). Yet the *decimal* arrangement of those divisions is supposed by many to have been derived from the ecclesiastical polity, and that from the Mosaic institutions (16). But that such decimal arrangement was not from the Mosaic institution is clear, in that we find it among nations who were wholly unacquainted with either the Jewish or the Christian polity.

As the method of reckoning by tens was thus common to most nations, we must seek a cause which was equally common to them : and this cause, most probably, was the number of those natural instruments of notation which every one carries about him, the fingers. This was a cause common to all, and which, therefore, all might have followed (17). This method of

(t) See *Co. Litt.* 52. b. See also *Butler's Nisi Prius*, 256—7. See 1 *Burr.* 92. *Taylor d. Atkins v. Horde & al.*

(15) See his *View of Engl. Gov.* and also *Squire on Angl. Sax. Gov.*

(16) See *Millar*, b. 1. c. 6, p. 114. *Bacon on Eng. Gov.* part. 1. c. 26. (fol. edit. 1739.)

(17) See *Millar's View of Eng. Gov.* b. 1. ch. 6. p. 115. and note †. *Adam's Amer. Ind.* arg. vi. p. 74. &c. 136. and see *Capt. Cook's 1st Voy. Descript. of Otaheite.*

in the hereditaments intended to be conveyed, he could communicate none to his posterity ;

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of reckoning was simple ; and simple must have been the method of early times, when people were yet rude. The American Indians are yet savage, and they continue to make use of this method to this day (18). More examples of general congruity might be selected, (as the trial by ordeal, for instance :) but when we find a cause to be general, shall we be surprised at a general effect ?

From the same source are we to trace the analogy between the usages of barbarous states and those of the feudal system. But yet the causes of the irruption of the northern invaders of the empire, and their views of conquest, and more especially the condition of those among whom they settled, were almost peculiar to themselves, and essentially different from those of most, if not all, others, who thus went conquering and to conquer : and therefore their system of government must have been, in some degree, singular (19).

But still this originally simple, though latterly so complicated, yet well-concerted system, so generally established in Europe, seemed calculated only for a nation of warriors, in their progress from an horde of savages to a settled state. Ill-adapted to a refined or refining age, its corruption, its decline, gave birth to a constitution, more fitted for a community of MEN.

Onr

(18) See *Adair* as above.

(19) See *Dalrymple's Feud. Prop.* ch. 1. And *Miller*, b. 1. ch. 4. p. 71.

[15]

Death of the
devisee be-
fore that of
the devisor.

posterity ; in the same manner as if a devisee had died before the devisor, his heir could

Our British ancestors were once savages like the rude natives of America ; and were the Britons our contemporaries, and not our progenitors, we should regard them less partially, and more readily allow the equality. Our Germanic forefathers were also savage : the northern nations were addicted to rapine and war, were rude and uncultivated ; they even placed the happiness of a future state in cutting each other to pieces, and drinking beer from the scull of an enemy ! (20).

When an horde of these warriors settled in a country, they were yet *a people*, and required the assistance of each other, while thus surrounded by foes. Though the country was portioned out among the several individuals entitled, yet each could not have defended his property by his own arm. The individuals were united, and formed a state. Hence were provisions of a military nature reserved. And as the causes of early nations were, in general, very similar, the effects were very similar also. Thus we discover usages analogous to those of the feudal system in various states. We descry the rudiments of it among the Scythians (21), and

(20) See the *Edda* ; *Fab. xx. Ode of Regner Lodbrog. Nor. Antiq. v. 1. c. 6. p. 120. c. 12. p. 310. v. ii. p. 105—111. & p. 232—3. and compare with Adair, 65. 135. and Roberts. Amer. B. 4. N. lxix. See also Millar's View, b. 1. c. 5. s. 2. p. 107. Falc. on Clim. b. 6. c. 2. p. 347. and Roll. Anc. Hist. b. 6. c. 1. s. 3.*

(21) *Hor. lib. iii. ode. 24. and see Roll. Anc. Hist. b. 6. ch. 1. s. 3. Mall. N. A. pref. and ch. 2. 4. &c.*

could not have succeeded. The death of
the devisor is as essential to the completion
of [16]

and we trace it through the countries which they over-
ran (22). In the several states of Europe which they
invaded, we find it established in a greater or a less
degree: we observe the same customs in their progress
in Asia (23): and we observe too, at least its resem-
blance, even in the remote island of Japan (24). In
several parts of Europe a system very similar, if not,
originally, the same, seems to have prevailed long be-
fore the invasion of the Gothic tribes. WHITAKER
finds it in the British polity, and thinks it coeval with
the first government of our island; and thence extends
it to other Celtic nations (25). LOWMAN points out
a great similarity between the Hebrew and feudal
systems (26). An analogous usage prevailed also, it
is said, in the New World; in Mexico, Peru, &c. (27);
and even in the islands of the Pacific Sea (28).

That

(22) See *Volt. Spir. Nat.* v. ii. c. 91. p. 248. and *Mall. N. A. ubi sup.*

(23) *Volt. ubi sup.* and 1 *Roberts. Charles V.* s. 3. p. 228. & 470. Note (YY).

(24) See *Linschoten*, b. 1. c. 26. p. 46.

(25) *Hist. Manch.* b. 1. c. 8. s. 3. and see 1 *Warr. Wales.* b. 3. p. 186. 195. 246. and *Tayl. on Gavelk. passim.* and *Wright's Ten.* 48. N. (e).

(26) *Lowm. on the Civil Gov. of the Hebr.* c. 4. and see *Ainsw. on the Pentateuch.*

(27) See *Volt. Spir. Nat.* v. 3. c. 147. p. 216. and *Roberts. Amer.* b. 7.

(28) See *Cooke's Voy.* Description of the Friendly and Society Islands.

of the devise, as the livery of seisin is to the completion of the feoffment. In both cases,

That this system was known, however, to our German ancestors, is clear; and by them established in the countries through which they passed, or in which they settled. By them was it planted, or at least improved, in our island; though it did not receive its completion till the arrival of the Norman race (29).

To argue that it was not known to the Saxons, because it was not matured till the Norman æra, is absurd. Can nothing exist till it is perfect? As there are causes common to all, or almost all, nations, there will be suggestions equally common: but the improvement of what is thus suggested must depend upon the several states. When we seek into the usages of early times, let us be careful to attribute them to simple causes (30).

I well know that the feudal system was not fully completed till the Norman period; all I contend for is,

(29) See *Millar*, b. 1. c. 4. b. 2. c. 1. p. 259. and note*. *Sullivan*, lect. ii. and iii. *Law of Forfeiture*, 45. *Stuart's View of Soc. in Eur.* b. 1. c. 2. s. 1. *Ferguson on Civ. Soc.* part 1. s. 2. *Mall. Nor. Ant.* vol. i. c. 3. p. 156. See *Spir. of Laws*, b. 11. c. 6. b. 30. c. 1. *Hargrave's Note to Co. Litt.* 64. 2. note (1). 2 *Bla. Comm.* c. 4. *Bac. on Eng. Gov. Dalrymp. Feud. Prop.* ch. 1. *Runnington on Hale's Com. Law*, c. 5. p. 107. note (4). 2 *Tyrr. Gen. Hist. Eng.* Intro. p. 86. *Stuart's Diss. Antiq. Engl. Const.* part 2. s. 1. and part 2. s. 4. *Squire, passim*.

(30) See *Stuart's View of Soc. in Eur.* b. 1. c. 2. s. 4. p. 54. (4to edit.) *Dalrymple on Feudal Prop.* ch. 1. p. 7—8. *Stuart's Diss. Ant. Eng. Const.* part 2. s. 4. p. 123. N. part 4. s. 2. p. 222. and s. 3. p. 247. 2 *Roberts. Amer.* b. 7. p. 299. (4to edit.)

cases, as they could not operate before their consummation, there was nothing conveyed; and consequently nothing could be inherited (u).

Here the feoffment was not perfected till the livery of seisin given, and so nothing passed to the ancestor; but there are cases where the purchase may be so far complete in the life of the ancestor, who dies before the perfection or ultimate essential

[17]

Conveyance incomplete in the life of the ancestor.

is, that it was known, (however imperfectly) to the Saxons, and that they permitted the devising of lands. "The feudal system, (says SIR JOHN DALRYMPLE,) was not established at once in England, but by degrees; the same was its progress in every other country in Europe (31)."

Some acquaintance with the feudal laws seems absolutely essential to the elucidation of our own, as they are relative to property, &c. Yet neither LITTLETON nor SIR EDWARD COKE appears once to have alluded intentionally to them; and still BARON GILBERT illustrates the works of *both* of those celebrated authors, by recurring to *feudal* principles!

(u) See *post*, ch. 4. p. 135.

(31) *Dalrymp. Feud. Prop.* c. 1. p. 17. and 23. and see *Wright's Ten.* c. 3. p. 135. &c. and N. (a). (b). *Kains's Ess. on Brit. Antiq. Ess.* 1. p. 23.

of such purchase, as to fix an inheritable property in him, so as to enable *his* heirs to *succeed* BY DESCENT to the hereditaments purchased, notwithstanding such deficiency of an absolute perfection : as where a fine had been levied, *sur cognizance de droit tantum*, &c. to A. in fee; and afterwards, but before execution, A. died; yet his heir might have entered: and though he were the first who entered, yet he should have been in BY DESCENT, and a posthumous nearer heir might have entered on him; it being a rule (x), that where the heir takes any thing which

Fine.
Cognizor
dies before
execution.

Yet the heir
in by descent.

(x) See 1 Co. 98. a. and b. *Moore*, 140—1. ca. 281. (*Shellie's Case*.) Of this rule see *Douglas*, 506, note. 1 *Fearne*, 102. (4th edit.) 2 *Burrow*, 1106. *Long v. Laming*. 1 *Hargrave's Law Tracts*, 497. 551. 2 *Bla. Comm.* ch. 15. p. 242. *Butl. N.* (1.) to *Co. Litt.* 376. b. 1 *Bro. Chanc. Ca.* 206. *Jones v. Morgan*.

Si terre soit done a un home a term de son vie, le rem. a un auter a terme de vie, le rem. al. iij. en le tail, le rem. en fee as drt. heirs le primer tent. en le rem. si touts fuer. morts, le droit heire celuy en le primer rem. serra adjudge eins per Disc. de Heritage, *purr ceo q. son Aunc. per possibility purr. aver ewe Enherit.* Trin. 11 *Hen. iv. pl. 14. fol. 74. b.*

might

might have vested in the ancestor, the heir shall be in BY DESCENT.

Here, by the levying of the fine, the right was acknowledged on an adverse suit (*y*), to have been in the ancestor; and, [18] consequently, *his* right was established; and the delivery of possession, on the writ of *habere facias seisinam*, was only to invest him with the actual seisin of that which was confessed to have been in him of right, by a matter of record, and of which he had already a seisin in law (*z*). And here this Seisin in law. case

(*y*) See *Mr. Hargrave's note* (c) to *Co. Litt.* 121. a. and 1 *Cruise on Fines*, 25.

(*z*) *Co. Litt.* 266. b.

And observe, that, since the statute 27 *Hen.* 8. the *cestuy que use* has the actual possession of the lands by virtue of that act; for as, on a fine, an use must necessarily arise, so now that use is immediately executed. See 13 *Vin.* 266. *Fine* (X. 3). *pl.* 3. 1 *Cruise*, 56. &c. ch. 4. *Touchst.* 4. and notes.

Yet the cognizee cannot bring trespass before an actual entry. 2 *Leon.* 147. *pl.* 182. *Berry v. Goodman*. But see *Cro. Eliz.* 46. *Anon.*

So in the case of a bargain and sale, the bargainee is in the actual possession by virtue of the statute, so as

[19] case differs from the case before put of a feoffment : in this, the right and property were

as to fix the property in him ; and also as to the assignment or transfer of such property over ; but he cannot bring trespass before his actual entry. *Carter*, 57. &c. *Geary v. Bearcroft*.

But note : a *common recovery* vests no freehold, either in deed or in law, nor does any use arise on such recovery, before execution served. See *Moore*, 141. case 281. *Shellie's case*. *Jenk. Cent.* 249. pl. 40. *Co. Litt.* 266. b. note (2). 2 *Cruise*, 134.

So that if an elder brother suffer a recovery, but no execution be sued, it will *not* make a sister to inherit in exclusion of the half-blood. See *Plowd.* 43. b.

Yet, if the person suffering a recovery die before execution, execution shall, in many cases, be sued out against his heirs : so that *when served* it shall have relation to the act of the ancestor, and the heir be in *by descent* : as where A. suffered a recovery with the use (among other uses) to the heirs male of his body, and died before execution ; on execution served, his heir was adjudged in by descent. *Shelly's case*, 1 *Co.* 93. b. 106. b. See *Co. Litt.* 361. b. 7 *Co.* 38. a. See also 5 *Burr.* 2786—7.

If a man recover an advowson, and the bishop collate by reason of lapse, it shall be a sufficient execution of the recovery to cause a *possessio fratris*. See 1 *Leon.* 234.

See further, of Execution : Of *Fines*, 1 *Cruise*, c. 1. p. 3. c. 4. p. 57. *Shep. Touchst.* c. 2. p. 4. *Coke's Readings*,

were fixed in the ancestor before execution; in the other, the livery of seisin was necessary to the fixture of such property: as the seisin was not given, the property was not fixed.

But yet it must be observed, that though the heir thus took *by descent* from the ancestor to whom the fine was so levied, still was he considered in a light which differed from that in which the common heir was taken: he should not have been in ward; neither should he have had his age; nor would he have tolled the entry of him who had right (*a*); (which are the characteristics, in some measure, of an estate by purchase.) Thus was he a being of a mongrel kind; something, as it were, between an heir and a purchaser; partaking of the nature of both, though more nearly agreeing to the description of the former than of the latter.

[20]

Readings, Read. 2. Tracts, 230. 3 Comyns's Dig. Execution (A. 6.) and Fines, (B. 9.)

Of Recoveries: 2 Cruise, c. 6. p. 134. See Dyer, 35. pl. 28. Ibid. 373—4. pl. 15. Comyns, as above.

(a) See 1 Co. 98. b. 106. b.

Again,

Copyholds.

Again, with respect to copyholds; if a surrender be made to the use of A. in fee, and A. die before admittance, yet the heir of A. shall be admitted; and upon such his admission, he shall be in BY DESCENT from the surrender, to which the admittance relates (b).

Exchange.

So also in the case of an exchange: If *both* parties die before *either* enter, the exchange is void: but if *one* enter, and the other die before entry, yet his heir may enter, and shall be in BY DESCENT (c).

Devise.

So, in case of a devise to A. in fee, and A. die after the devisor, without having ever made any actual entry himself; yet his heir may enter, and shall take BY DESCENT (d), (though the devisee had but a

(b) See 5 *Burrow.* 2786—7. *Vaughan d. Atkins, v. Atkins*; and see *Gilb. Ten.* p. 288. *Robinson on Gavelk.* b. 1. c. 6. p. 98. 6 *Viner's Abr. Copyh. (B. e.)* 1 *Com. Dig.* 615. *Borough English. Cartew,* 275—6. *Benson, v. Scott.* 1 *Watk. Copyh.* 103. [163. 2d edit.]

(c) See *Perkins*, s. 285, 286. and 1 *Rep.* 98. b.

(d) See *Cro. Car.* 200. *Hulm, v. Heylock.*

seisin

seisin in law (e). So also, on a devise by custom before the statutes of Hen. VIII. the heir of the devisee might have had a writ of *ex gravi querela*, if the devisee had died after the devisor, and before entry (f). [21]

If a person takes a remainder at the time of its creation, otherwise than by way of use or devise, the seisin is delivered to the particular tenant of the freehold; which seisin shall enure and give effect to all the remainders limited thereon (g.) In case a remainder

(e) See *Co. Litt.* 111. a. 240. b.; and see *Jenk. Rep.* 227. pl. 92. and *Dyer*, 221. pl. 16. *Bishop v. Bishop. Dr. & Stud. Dial.* 2. c. 33. *Touchst.* 455. *Bull. N. P.* 103. 2 *Mod.* 7. *Co. Litt.* 214. 236. *Plowd.* 412, 413. 10 *Co.* 40. b. 1 *Leon.* 290. ca. 293. *Matheson v. Tret.* 3 *Bl. Comm.* 168. ch. 10.

(f) See *F. N. B.* 199. B. 200. B. and compare with *Co. Litt.* 111. and *F. N. B.* 200. B. and note (a), p. 463. of 8th edit. 1755, 4to.

(g) See *Litt.* s. 60. 450. See also 1 *Vent.* 260—1. and 2 *Bl. Comm.* 167. ch. 11.

So the admission of the particular tenant for life or years of copyhold premises, is the admission of him in remainder; but so 'as not to prejudice the lord of his fine, where, by custom, such fine is due. See 4 *Co.* 23. a. *Fitch's case.* 2 *Levinz*, 107. *Blackborne v.*

[22] remainder be limited by way of use or by devise, as these modes were introduced, (the latter, perhaps, revived; see *ante*, p. 7. and note (k), since the decline of the feudal system, there needs no livery to be given at all; yet the remainders so limited become equally transmissible to the heirs of the devisee, *or cestuy que use*. And it is the same with respect to executory devises, contingencies, and possibilities (h).

Attornment.

If a person took a remainder by a mesne grant, such grant was anciently attended with attornment; but now attornment is not necessary (i).

In

Greaves. 1 *Vent.* 260—1. *Batmore v. Graves. Moore*, 358. *ca.* 488. *Dell v. Higden.* 465. *ca.* 658. *Tipping v. Benning.* 1 *Mod.* 102. and 120—1. *Blackborne v. Greaves. Lex Custumaria*, ch. 17. p. 152. ch. 18. p. 166. *Gilb. Ten.* 163. 194. *Co. Compl. Copyh.* s. 56. p. 130. and *Supplement*, s. 7. p. 462. See 2 *Comyn's Dig.* 391. *Copyhold*, (G. 9.) 6 *Viner's Abr. Copyh.* (P. b.) and (C. e.) *pk.* 15. *Kitch. Courts*, 122. a. *Cro. Jac.* 31. *pk.* 1. *Annelme v. Annelme.* 3 *Lev.* 308. *Barnes v. Corke.*

(h) *Ante*, p. 4. and *post.* ch. 3. sect. 2. p. 122.

(i) See *Gilb. Ten. Co. Litt. &c.* under Attornment. And see the statutes 4 & 5 *Ann.* c. 16. and 11 *Geo. II.*

c. 19.

In the case also of **EQUITABLE** relations; if the ancestor executes articles of purchase, and dies before such purchase be completed, A COURT OF EQUITY will compel such completion in favour of the heir of the purchaser; the vendor being considered as a trustee for the vendee; and the estate shall, IN THE CONTEMPLATION OF SUCH COURT, be deemed in such purchaser from the time of the execution of the articles, so as to be capable of being devised by such ancestor, or inheritable by his heir (*h*). Equitable relations.

[23]

c. 19. and *Co. Litt.* 309. a. note (1), (Harg. & Butl. edit.) and *Doug.* 283.

(*h*) *Preced. Chan.* 320. *Greenhill v. Greenhill & al.* 1 *Vesey*, 437. *Potter v. Potter.* 2 *Ves.* 631. *Hinton v. Hinton.* *Shep. Touchst.* 429, note (2), (edit. of 1791.) 2 *Pr. Wms.* 629. *Langford v. Pitt.* 1 *Ath.* 572. *Green v. Smith.*

But we must not confound these equitable interests with estates at common-law; for such an interest as mentioned above is incapable of an actual seisin. It is stated from its analogy to the cases preceding it, and not as furnishing a rule for common-law estates. For on the completion of the agreement by conveyance to the heir, such heir would undoubtedly take by purchase at common-law; however, he may be considered as being in by a court of equity. See *post.* c. 5. and *Doug.* 771. *Goodright d. Alston v. Wells & al.*

Actual seisin
necessary on
a descent.

[24]

Thus, in case the ancestor takes BY PURCHASE, he may be capable of transmitting the property so taken to his own heirs, without any actual possession in himself; but if the ancestor himself takes BY DESCENT, it is absolutely necessary, in order to make him the stock or *terminus* from whom the descent should now run, and so enable him to transmit such hereditaments to *his own* heirs, that he acquire an ACTUAL SEISIN of such as are corporeal, or what is equivalent thereto in such as are incorporeal (*l*); or that he exert some act of

(*l*) See 2 *Bla. Comm.* 209. ch. 14. *Gilb. Ten.* 12. *Co. Litt.* 11. b. 15. a. 40. a. 239. b. *Hale's Hist. of the Comm. Law*, 267. ch. 11. *Wright's Tenures*, 183. and note (9), ch. 3. 3 *Rep.* 41. b. 42. a. & b. *Ratcliff's case.* 8 *Rep.* 36. a. in *Pain's case.* *Noy's Maxims*, 22—3. ch. 4. *Kitchen of Courts*, 109. See 3 *Wilson*, 526. *Newman v. Newman*. But note: though it be necessary that the ancestor *be seised*, yet it is by no means required that such seisin continue till the death of such ancestor: for if he had been seised at any time during his life, and afterwards disseised, still, if he had not parted with his right or property, his heir shall inherit. See *post.* s. 3. See *Coke on Fines Read.* 19. *Tracts*, 270. *Co. Litt.* 237. b. And note, if a seisin be pleaded, it shall be intended a *dying seised*. See 4 *Leon.* 97. *Paston v. Townsend*.

ownership

ownership over such as are in reversion or remainder expectant upon an estate of freehold (*m*).

For though the heir of the person to whom the fine *sur cogn. de droit tantum*, &c. was levied, or to whom the surrender was made; though the heir of the party to the exchange who died before entry, of the devisee, of the remainder-man, or of the purchaser, shall succeed to the hereditaments of their respective ancestors *by descent*, though those ancestors had never had any *actual* seisin; yet, in order to enable *them* to turn the descent, and transmit such hereditaments to *their own* heirs, it is indispensably necessary that such persons, who so succeed **BY DESCENT**, gain an **ACTUAL POSSESSION**, or what is equivalent thereto, in the respective premises; otherwise they shall descend, not to *their* heirs, (as such,) but to those who shall be able to shew themselves the right heirs of such first purchaser; without any regard to any intermediate person who was never

[25]

(*m*) See *post.* ch. 3. sec. 1.

in the actual possession of such hereditaments.

Seisin in law; Immediately on the death of the ancestor, (whether such ancestor had taken by descent or by purchase,) or the intermediate person to whom the estate devolved, (whether such person had an actual seisin or not,) the law casts the estate upon the heir (*n*): And as he has thus the right, it gives him also a presumed possession or seisin; (for I speak now of estates in possession). On the death of the ancestor, as the possession would be otherwise vacant, the law supposes or presumes it to be in the heir; and this presumptive possession or

[26]

Or presumptive seisin.

(*n*) See 2 *Bla. Comm.* 201. ch. 14. 3 *Ibid.* 168. ch. 10. *Co. Litt.* 15. b. 237. a. and b. See 4 *C.* 58. a. and b. Case of Sadlers. *Gilb. Ten.* 18. See also *Carthew*, 260. *Symonds v. Cudmore*: and 3 *Wils.* 528. *Newman v. Newman.*

And such heir immediately becomes tenant to the lord: inasmuch, that if he die before entry, yet a relief shall be paid on his death. See *Kitch.* 146. a. *Fitzh. Abr. Relief.* 12. and 2 *Com. Dig.* 402. Copyh. (K. 11.) *Co. Litt.* 239. b. note (1). See *Gilb. Ten.* 24. and *Watk. N.* xxiii. p. 372. and *N.* xxiv. p. 377. *Brooke, Relief*, 2.

seisin

seisin is what is termed a possession or seisin IN LAW.

And we must be careful to remark, that this possession or seisin *in law* in the heir, is, as we have stated it, no more than *supposed or presumed*; for if there be an *actual* possession or seisin, either by right or by wrong, in any other person, such actual possession or seisin *rebutts* the presumption of a seisin in the heir (o).

Actual seisin, though by wrong, rebuts the presumption.

If, on the death of such ancestor, the hereditaments descending were IN LEASE FOR YEARS to any, then the possession of the lessee for years gives, not a seisin or possession *in law*, but a seisin or possession IN DEED to such heir (p).

[27]
Seisin in deed.
Lessee for years.

(o) See *Gilb. Ten.* 22. 4 *Rep.* 58. a. and b. *Co. Litt.* 266. b. note (1), 277. a. *Brooke*, tit. *Dower*, 66. 75. *Seisin*, 13. See *Plowd.* 137. b. 3 *Bacon's Abr.* Lease, (I. 5.)

(p) See the next section; and ch. 3. s. 1.

And the reversioner may, in pleading, say, that he was seised *in his demesne*. See *Plowden*, 191. and *Co. Litt.* 15. a. and note (3).

Tenant of
the freehold.

No seisin of
reversion, &c.
on a freehold.

If such hereditaments were leased or limited FOR LIFE, OR IN TAIL, so that an estate of FREEHOLD was created, then the seisin or possession INDEED *isin such PARTICULAR TENANT* (q). And though a person is said to be *seised* of such reversion or remainder thus expectant upon an estate of freehold, and such seisin is often styled a seisin in law; and so a seisin in deed and a seisin in law be supposed to exist together of the same estate; yet this confusion seems to have arisen from the different acceptations in which the word seisin has been taken; and from using it in a general sense, when it should be taken in a strict or confined one; or in a confined one, when it should be used in a general sense.

By the seisin of such reversioner or remainder-man is meant, in reality, no more than that such reversioner continues, or that such remainder-man is placed, in the tenancy, and that the property is fixed in him. The particular estates and the reversion or remainders over, form, in law,

(q) See *post.* ch. 3. sec. 1.

but

but *one estate*; and, consequently, by delivering the possession to the person first taking, it extends to all. All therefore, may be said to be *seised*; as they are all placed in the tenancy, and as the property is fixed in all.

If the tenant for life surrender to him immediately in remainder, and the remainder-man agree to such surrender, the frank-tenement is immediately in him, and a *præcipe quod reddat* lies against him before entry; but before entry he shall not have trespass (r).

But, on the other hand, when the seisin is divided into a seisin in deed and a seisin in law, we confine it merely to the *present corporeal possession* of the premises; not extending it to the fixture of an interest which is to come into actual enjoyment on a future event. The seisin, not strictly in its technical sense, but in its primitive and vulgar acceptation, *i. e.* the corporeal or visible possession, must, in the last case,

(r) *Bro. Surrender*, pl. 50.

be really expectant upon, and postponed to, the determination of the particular estate. And in this sense the reversioner or remainder-man cannot be seised either in deed or in law.

Words frequently convey an idea in one age very different from that which they were designed to excite in another. The *thing* is often forgotten, while the term remains. The usage and customs vary; they dwindle into mere form, or they die of a gradual decay; while the word continues in its original state. Thus the term *vesture* has experienced a similar mutation with that of *seisin*, and is, as frequently, extended to things to which it was not intended to apply. We now say that a remainder is *vested*, as we say that the remainder-man is seised. We have seen that the term *seisure* is thus applied in a peculiar sense—in a sense in which it was not originally designed to apply; and when we say that such remainder is *vested*, we mend the matter but little; we only mean, that the property is fixed in him, and not contingent.

The

The term vested is allusive to the improper investiture of antiquity, which required a subsequent actual seisin to complete it; and it is so used, from the analogy such fixture of property in the remainder-man bears to that of the person so invested, and not from any absolute propriety of expression. Thus, improper investiture appears to have been an inchoate form of delivering seisin, and required, as we have said, an actual livery to complete the transfer; and to have arisen from a particular mode of such livery—that of *investing the tenant, or clothing him with a robe or vest* (s). The vesting, therefore, of an estate was originally and properly applicable to that of the particular tenant (or tenant in possession) to whom the actual seisin was given, since it was clearly no other than a symbolical livery.

When we speak, then, of a seisin in deed, or in law, it is allusive to the actual

(s) See *Sullivan*. L. vi. p. 59. &c. 2 *Bl. Com.* c. 22. p. 366. *Kaims's Law Tracts*, Tr. iii. p. 106—8. *Robins. Gavelk.* B. 2. c. 2. p. 172. 1 *Burr.* 109. 1 *Watk. on Copyh.* 260. [408-9. 2d edit.]

possession

possession of the premises ; and not with reference to the interest of the reversioner or remainder-man, or their being placed in the tenancy.

Again ; the great distinction between such reversion or remainder expectant upon a freehold, and an estate of which a person may have a seisin in deed or in law, or to which he has only a right, is this : The person *in the corporeal possession of the freehold*, who is in the perception of the profits, who has the *actual* possession, has *the seisin in DEED* : the person who has a right of property in the premises, and also a title to enter *immediately into them when the possession is VACANT*, has a *seisin in LAW*. In the former case, *the possession is already full, and, therefore, excludes a presumption* ; but in the latter, it being *vacant*, *the law presumes it to be in him who has right*. But if the *actual possession be in one person, and another has a title to enter during such possession, he has but a right* ; by reason of the actual possession being in such person. But, in the case of a reversioner or remainder-man, his title to enter does not arise

arise *till* AFTER *the possession of a right-ful (t) tenant* is EXPIRED, and not while the possession is in any one else. During the particular estate, the possession is in the particular tenant; but it is not till his possession BE DETERMINED that the reversioner's title to enter accrues. Now when his interest is determined, the law supposes the premises to be vacant: (for if the particular tenant continues the possession after the estate ended, it would be a deforcement of the reversioner; which being a wrong in the tenant, the law will not presume:) and upon the determination, therefore, of the particular estate, does the title of entry of the reversioner arise; and the possession being thus supposed vacant. the law presumes it to be in him who has title to enter: and thus has he a seisin in law; for so is his seisin

[29]

Deforcement.

(t) For though the reversioner, &c. may enter on him who *intrudes* on the death of the particular tenant, and so acquires the *wrongful* possession; yet, on the expiration of the estate of the tenant, his interest ceases to be a reversion or remainder, and therefore not within our assertion.

now,

[30]

No dower of
a reversion
on a freehold.

now, and now very properly, called (*u*). But then this seisin in law is never in the reversioner or remainder-man *as such*; for as soon as the particular estate is determined, it ceases to be a reversion or remainder, and becomes an estate in possession (*x*): and, consequently, a remainder-man or reversioner cannot strictly be said to be seised *as such*, though it is so said in common parlance. And though it is so said, (that he has a seisin in law, even during the continuance of the particular estate,) yet this ideal seisin is not put upon a level with the strict legal seisin in the person entitled, when the possession is absolutely vacant: for notwithstanding it appears, that of a seisin in law, a widow may have her dower, yet she shall not have dower of the seisin we now mention; but shall wait for that strict seisin in law which takes place on the determination of the particular estate, in order not only to be endowed, but even to be endowable (*y*).

(*u*) *Plowd* 29.

(*x*) *Plowd.* 153—155.

(*y*) See *post.* ch. 3. sec. 1.

But

But to return: If, on the death of the ancestor, a stranger enters before the heir, and in legal language, **ABATES**, then the actual possession of the abator, though by wrong, shall rebut the seisin or possession in law of the heir (z). So, had the ancestor himself been **DISSEISED**, and died before a subsequent entry, the actual seisin would be in such disseisee, and the heir have but a right (a).

Abator.

[31]

But when hereditaments descend, and a stranger abates, yet, though the heir has but **A RIGHT** remaining, he may release it to such abator (b). So, also, if such hereditaments be copyhold, and another be

Release of right by the heir.

By a Copyholder.

(z) *Brooke, Dower*, 66. 75. *Seisin*, 13. *Co. Litt.* 277. a. *Plowd.* 137. b. 3 *Bac. Abr.* 400, 401. *Lease*, &c. (I. 5.) *Ante*, p. 26. (g).

(a) This is implied in the very term *disseisin*. And see *Perkins*, sec. 280. and 1 *Burrow*, 106. *Taylor d. Atkins v. Horde*, and *post.* sec. 3. *Gilb. Ten.* 48. *Hob.* 322. *Elvis v. Archbishop of York*, & *al.*

(b) *Brooke, Descent*, 27. See *Litt.* sec. 448. *Co. Litt.* 275. 266. a. and b. 5 *Com. Dig.* 370. *Release*, (B. 2.) *Touchst.* 321. 331. 10 *Co.* 48. *Lampett's case.*

wrongfully

[32]

By tenant in
gavelkind.

A right not
grantable.

wrongfully admitted, the heir may release to the person so admitted tenant (c). So, also, an infant of fifteen may release his gavelkind lands to one in possession of the freehold (d), &c. &c. But though the right of the heir may be thus released *to the person in possession*, yet it cannot be given or granted *to any other*, it not being in its nature grantable (e).

(c) *Co. Litt.* 59. a. and note (2), 60. a. 4 *Rep.* 25. Kite & Quienton. See *F. N. B.* 98. A. See further 2 *Com. Dig.* 395. Copyh. (I. 1.) 6 *Viner's Abr.* 74. Copyh. (Z. a.) *Co. Copyh.* sec. 36.

And note; that the release of a copyholder can only operate *by way of extinguishment*. See *Watk. N.* lxxix. to *Gilb. Ten.* 410—11.

So the person having right may enter, notwithstanding the admission of the person who is become tenant by wrong. See *Watk. Gilb.* 191. N. (m.) 457. N. cxxix.

(d) See *Robins. of Gavelk.* b. 2. c. 3. p. 197.

(e) *Co. Litt.* 214. a. 265. a. & N. 266. a. 267. a. 10 *Co.* 48. a. Lampett's case. *Perkins*, sec. 280. &c. *Touchst.* 231.

But if the releasee have only a possession *in law*, it will be sufficient. See *Litt. S.* 447. *Gilb. Ten.* 49. *Co. Litt.* 265. a. N. (1).

If

If the heir has such right together with Dower of a seisin in law. *a seisin IN LAW*, his widow may claim her dower, though he die before entry (*f*); and though that seisin in law abide in him but for a single moment (*g*). As where lands descend to an heir *who is married at the time of the descent cast*, and a stranger abates on the death of the ancestor, and, Abator. during the possession of the stranger, the heir dies, his widow shall be endowed (*h*).
[33]
[34]

(*f*) *Litt. s.* 448. 681. *Co. Litt.* 31. a. 266. b. 358. b. *F. N. B.* 149. D. *Doct. and Stud. dial.* ii. ch. 15. *Perk. sec.* 304. *Brooke, Dower*, 66. 75. *Fitz. Ab. Dower*, pl. 15.

(*g*) 2 *Blu. Comm.* 132. ch. 8. *Cro. Eliz.* 503. *Broughton v. Randall. Bull. N. P.* 118. *Fitz. Abr. Dower*, 34. 42.

(*h*) See *Perk. sec.* 371—2. *Gilb. Ten.* 31. See also *Preston on Estates*, 546. ch. 7.; and *Brooke, tit. Dower*, 75.

(*i*) See *Gilb. Ten.* 31. 2 *Blackst. Comm.* 132. ch. 8. *Litt. sec.* 448. *Ante*, p. 25. (*f*).

[35]

Instant.

the abator of the heir, but the disseisor of the ancestor,) the seisin, in contemplation of law, is in such heir *before* the abatement of the stranger. For supposing that the stranger had entered the very instant that the ancestor died, yet, as the possession was necessarily *vacant* before he could have abated, the possession during such vacancy, was presumed by the law to have been in the heir: and the law frequently permits an instant to be cleft asunder; for it tells us, that “in things of an instant there is A PRIORITY OF TIME; and the one shall be said to *precede* the other, although both shall be said to happen *at one instant*; for every instant, says the law, contains the end of one time and the commencement of another,” &c. (*k*). But we must not forget, that though it thus cleaves an instant into *two* parts, it gravely informs us that it does not carry its pretensions so far as to be able to carve it into *three* (*l*).

(*k*) See *Co. Litt.* 185. b. 298. a. 1 *Co.* 76. b. 174. b. *Plowd.* 258.

(*l*) See 6 *Co.* 33. a. b.

But

But if the heir had *not* been married at the time of the descent cast, and a stranger had abated, and *afterwards* the heir had married, and died before a subsequent seisin, his wife should *not* be endowed. For, by the entry of the stranger, his seisin in law is *rebutted*; and, therefore, as he has no seisin either in deed or law, (and seised he must be, says Sir Edward Coke (*m*), either the one way or the other, during the coverture,) he has only *a right* remaining in him. And as a seisin, either in deed or in law, is thus essential to give title of dower to the widow, and as the heir has now neither of those seisins, by consequence his widow cannot be dowerable (*n*): as a widow can no more have dower of a right (*o*), than an husband can have his curtesy (*p*). Seisin rebutted.

[36]

No dower or curtesy of a right.

There

(*m*) *On Litt.* 31. a. and see *Perk.* sec. 366.

(*n*) See *ante*, p. 26. 30. *Brooke, Dower*, 66. 75. *Lease*, 57. *Seisin*, 13. *Co. Litt.* 277. a. *Plowd.* 137. b. *Perk.* sec. 367.

(*o*) Note an error in *Wood's Inst.* b. 2. ch. 1. s. 5. p. 123. (edit. of 1738.) where it is said, that the widow shall be endowed where the husband has only *a right*.

[37]

There must be a seisin in deed or in law in the husband during the coverture to entitle the widow to dower; and therefore, as in the case immediately before put, if the stranger had entered *before* the mar-

right. He seems to cite 1 *Inst.* 31. a. and b, in support of such assertion. But Lord Coke, neither there, nor elsewhere that I can find, says that she shall be endowed of a right. Indeed, in the very place referred to, he says positively, (as quoted above,) that the husband must be *seised*, either in deed or in law, during the coverture; and, therefore, in effect, directly contradicts such position: for to say that a person can be SEISED *even* IN LAW, of A RIGHT, is a contradiction in terms.

In the very next page to that now quoted, *Wood* tells us from the same author, (1 *Inst.* 32. a.) that the widow shall not be endowed of a reversion on an estate for life, "BECAUSE *the husband had neither a seisin in deed or in law.*" Now if this be a reason why she shall not be endowed of such reversion, it will be a reason also why she shall not be endowed of such right; since of *that* also, "*the husband had neither a seisin in deed or in law.*" But *Wood's* opinion alone is not authority; "though (as C. J. *Reeves* observes) he generally quotes very fair." See C. J. *Reeves's Instructions for the Study of the Law*, in the COLLECTANEA JURIDICA, vol. i. p. 80.

(p) See *Perkins*, s. 457. Co. Litt. 29. a. and 2 Co. 59. b.

riage

riage of the heir, and the heir had died during the abatement, his wife could not be entitled to dower, because the heir had no seisin during the coverture. So had the heir entered on the death of his ancestor, and gained an actual seisin, and then, during his celibacy, had been *disseised*; and, *after such disseisin*, had married, and died before a subsequent recovery of seisin, his widow should *not* be endowed (*q*). But had he, in the first case, been married at the time of the descent, and so had a seisin in law during the coverture; or had he had an actual seisin *after marriage*, and then been disseised (*r*), or had aliened his lands (*s*), his widow would be certainly dowable (*t*).

[38]

But

(*q*) *Perk.* sec. 366. Nor should the husband, in such case, have *his curtesy*, *Perk.* s. 458.

(*r*) *F. N. B.* 147. (E.) *So of curtesy.* *Perk.* s. 472. and *Co. Litt.* 30. a.

(*s*) *Co. Litt.* 32. a. *F. N. B.* 147. (E.)

(*t*) For it is not necessary that the seisin continue during the whole of the coverture: for though the dissolution of the marriage will destroy dower, yet the discontinuance of seisin will not. See *Co. Litt.* 32. a.

No curtesy of
a seisin in
law.

[39]

Exception.

But if the hereditaments descend to a daughter or other heiress, and such heiress *has* a seisin in law unrebutted by another seisin, yet such seisin in law will *not* entitle her husband to THE CURTESY (*u*); unless it be in special cases, as of rents, advowsons, &c. where the wife dies *before* the rent becomes payable, or the advowson void; and this only from the necessity of the case (*x*).

If

and b. (But as to *free-bench of copyholds*, the customs generally require a *dying seised* either in deed or in law. See *Co. Litt.* 239. b. *Carth.* 275. *Benson v. Scott.* 2 *Ves.* 633. *Hinton v. Hinton.* 2 *Atk.* 526. *Godwin v. Winsmore.* *Cowp.* 481. *Salisbury d. Cooke v. Hurd.* 2 *Watk. Copyh.* ch. 3. p. 73. [82, 3. 2d edit.] But note; a dying seised is not essential to entitle a widow to dower of lands in gavelkind, according to the custom of Kent. See *Robins. Gavelk.* b. 2. c. 2. p. 172-3.

(*u*) *Co. Litt.* 29. a. and n. (3). 40. a. 2 *Blackst. Comm.* 127. ch. 8. 8 *Rep.* 34. b. 36. a. Paine's case. *F. N. B.* 143. (O.) 149. (D.) 1 *Co.* 97. b. *Doct. and Stud.* b. 1. ch. 7. and b. 2. ch. 15. *Perk. Ten. p. le Curtesie*, s. 457. 458. 464. 470. *Brooke Ten. p. le Curtesie*, 7 and 13. *Dower*, 75. *Kitch. Courts*, 159. b. *Finche's L.* b. 2. ob. 3. p. 129. See 3 *Atkins*, 469. *De Grey & al. v. Richardson & al.* and 1 *Verey*, 307. *Hearle v. Greenbank*.

(*x*) *F. N. B.* 149. (D.) *Co. Litt.* 29. a. and n. (5.) *Perk.* s. 468. &c. 2 *Sidnorfin*, 110. 117. *Dethick v. Bradburne*.

If lands descend to the heir, they shall be Assets before entry.
ASSETS in his hands BEFORE ENTRY (y).

So a seisin *in law* only is sufficient to Avowance.
AVOW upon (x); but in order to maintain [40]
ASSIZE, or any **ANCESTRAL WRIT**, an
ACTUAL SEISIN is necessary (a). But *the* Writ of right, &c.
heir, who has had only a seisin in law (b),
 or no seisin at all in himself, may maintain
 a writ of right, and allege an actual seisin Espleas.
 in his ancestor (c).

v. Bradburne. *Brooke, Ten. p. le Curtesie*, 5. 9.
Doct. and Stud. b. 2. ch. 15. *Kitch.* 159. b. 1 Co.
 97 b. 2 *Comm.* 127. c. 8. See *Preston on Estates*,
 484—9. and *Bacon's Abr.* tit. *Curtesy of Eng. (C.)*
sec. 2. pl. 2.

(y) *Brooke Assets p. Desc.* 8. 1 *Com. Dig.* 422.
 (Assets, A.) 3 *Vin. Abr.* (Assets, A.) pl. 3. *Dalton's*
Sheriff, 126. ch. 26.

(2) See 4 Co. 9. 10. in Bevil's case.

(a) See 4 Co. 9. 10. *Litt.* 2. 681. And see *Com.*
Dig. Assize (B. 5.) Seisin, (C.) and *Viner*, tit.
Assize.

(b) So a *præcipe quod reddat* will lie against him on a
 seisin in law. *Bro. Seisin*, 13. *Præcipe quod reddat*,
 5. & 38. *Siderfin*, 58. *Wheeler v. Honour*. 3 Co.
 26.

(c) See *F. N. B.* 3 *Blackst. Comm.* &c. &c. of writ
 of right.

Alleging of
seisin by the
heir.

(Esplees.)

By a pur-
chaser.

[41]

Remainder.

But this privilege of alleging a seisin in the ancestor is peculiar to AN HEIR, or one who takes BY DESCENT (*d*): As in maintaining a writ of right, an ACTUAL SEISIN, by taking esplees, is necessary to be alleged; and as the heir, in the case now under consideration, has not such seisin in himself before entry, the law allows him to take advantage of, and plead, the seisin of his ancestor. But as a purchaser takes immediately by his own act, he can have no such ancestor in whom to allege such seisin; for the alleging of such seisin is confined to AN ANCESTOR, and has nothing to do with a FEOFFOR, DONOR, &c. Such purchaser, therefore, in order to maintain such writ, must count upon HIS OWN *actual seisin*; and if he has had no actual seisin, he cannot maintain it. So if an estate be devised to A. for life, with remainder to B. in fee, and B. die in the life-time of A.: here the remainder being vested in interest in B. his heir shall inherit, and take it when it falls: but the

(*d*) See *Co. Litt.* 293. a. 1 *Blackst. Term Rep.* C. B. *East.* 28 *Geo.* 3. 1—6. *Dally v. King.*

remainder.

remainder-man cannot maintain a writ of right during the continuance of a prior estate of freehold in possession (e), having then only an estate **IN REMAINDER**: but the method by which he must recover is by **A FORMEDON** (f); and in bringing **Formedon**. which, it is necessary that he allege esplees in the particular tenant (g).

But although the estate descending to the heir be sufficiently vested in him before his own actual entry or seisin, as to the purposes already mentioned, yet it is absolutely and indispensably requisite that he be **ACTUALLY SEISED** of the hereditaments so descended, in order to make **HIMSELF** the stock of descent or **TERMI-** Actual seisin. [42]

(e) Nor *after* the determination of that estate till he gain an *actual* seisin by entry, or otherwise. *F. N. B.* 217. b.

(f) See *Fitzherbert's Nat. Brev.* 217. *Form. en Remaind.* 3 *Blackst. Comm.* 191. ch. 10.

(g) See *Dyer*, 140. pl. 41. *Brooke, Esplees*, 1. 3. 10. *Hale on F. N. B.* 200. (B.) note (a), page 463. and 214. (A.) note (c), p. 492. and 6 Co. 3. *Markall's case*, and *Kitch.* 126. b.

NUS (*h*), and make such hereditaments transmissible to HIS OWN *heirs*. For if he die BEFORE ENTRY OR OTHER ACTUAL SEISIN OR POSSESSION OBTAINED, the brother of the HALF BLOOD shall succeed to the inheritance, in exclusion of the sister of the whole (*i*): as the person now claiming must make himself heir to him who was LAST ACTUALLY SEISED by entry, receipt of rent, presentation to advowson, &c. or to THE ORIGINAL PURCHASER, OR MESNE GRANTOR, as the case may require.

(*b*) See *ante*, p. 25.

(*i*) *Non Jus, sed seisinā facit stipitem*. See 2 *Bl. Comm.* 312. ch. 20. who refers to *Fleta, lib. 6. c. 2. s. 2.* and see *Bract. lib. 2. c. 30. f. 65. b.* *Hale's Com. Law*, ch. 11. p. 267. and see *Ibid.* 261. (*fourth edit.*) 2 *Blackst. Comm.* 228. ch. 14. & 312. ch. 20. *Litt. s. 8. Co. Litt.* 14, 15. &c. *Brooke, Descent*, 27. & 51. *Jenk. Cent.* 242. *pl. 25. Carth.* 87—8.

SECT. II.

How an actual Seisin may be obtained.

[43]

IN the preceding section we have observed that ancestors, from whom an inheritance can be derived, may be divided into those who have taken by purchase, and those who have themselves succeeded by descent to the hereditaments claimed; and as to those who have taken by purchase, that the *fixing* of the property in the premises conveyed in the person so taking, is sufficient to render them transmissible to the right heirs of the person in whom the property is so fixed. When a person, therefore, claims by descent from such FIRST PURCHASER, he need only allege SUCH FIXTURE OF PROPERTY; and is by no means obliged to shew an ACTUAL SEISIN in the person from whom he claims; but as the requisites to such fixture of property are thus relative to a PURCHASE,

Obtaining an actual seisin on a descent.

[44] PURCHASE, and essential to its completion, I think it unnecessary, and beside the purport of these pages, to say any thing further on this head.

I shall, therefore, when speaking OF THE MEANS OF OBTAINING AN ACTUAL SEISIN, confine myself merely (or at least in general) to the means of obtaining such seisin ON A DESCENT: or, in other terms, of the means of acquiring such seisin by a person who himself takes by descent, as to enable him to transmit the hereditaments descending to HIS OWN *right heirs*.

By entry.

The most common and direct method, then, of obtaining AN ACTUAL SEISIN, when hereditaments DESCEND to a person, and such hereditaments are of a corporeal nature, is to make AN ACTUAL ENTRY in the lands so descended: but as the manner of making such entry is so generally understood, and already so plainly set forth, and as the intent of the following sheets is only to explain what is conceived to be obscure, or to collect into a concise view
what

what is scattered through the pages of prolixity; and not to tire the reader with the needless repetition of that which he may find better arranged and elucidated elsewhere; I shall content myself with just tracing the outlines of this doctrine, and shall then refer to those authors who have treated of it more at large.

[45]

When an ancestor, therefore, dies, the heir is to enter actually in the lands; and such entry may be into any part of such lands, and by any part of the person, (as where one entering into an house by the window, and when half out and half in, was pulled out again by the heels, the entry was adjudged sufficient (a)—). And such entry shall give him AN ACTUAL SEISIN of all such lands whereof such ancestor died seised, within the same county, and into which he had a right to enter at

Sufficient.
What?

(a) Et pur ceo qu'il ne purra entrer per le huis, il entra per le fenestre, et quant l'un moitie de son corps fuit deins la meason & l'autre de hors, il fuit treit hors; per q. il port assise: & fuit agarde q. le plt. recovers. 8 *Ass. pl.* 25. f. 17. b. and vide *Brooke, Seis.* 20. and 23. and *Entre Cong.* 57. and 61.

the

[46]

the time of such entry made, or which were in the possession of the same abator: but entry into lands in one county, or into which he might then enter, or which were in the possession of one abator, will not give him seisin of lands in another county, or to which his right of entry did not till afterwards accrue, or which were in the possession of other abators (b).

Claim.

But however this entry be made, it must be peaceable, and not “with strong hand.” For if the heir cannot go peaceably on the lands, he may go as near to them as he safely may, and there make claim, which will amount to an actual entry (b).

(b) See further *Fitzh. Abr. Brooke. Littleton. Co. on Litt. Comyns's Dig. Viner's Abridgment. Gilb. Ten. 3 Com. tit. Entry and Continual Claim; and Co. Read. Fines, Readings 15, 16, 17. Tracts, 263. 1 Leon. 265.*

If two acres descend, and a stranger abate into one of them, the heir should enter into both; or, at least, into that acre in which the abatement was made, *in the name of both*; for if he should enter into the other in the name of both, it might be doubtful whether it would suffice. See *Plowd. Quarries, qu. 143.*

But

But here it may not be improper to observe, that it is not the mere act of going on the lands that will constitute a legal entry, sufficient to vest the actual possession in the person who has a right. Thus when the disseisor requested the disseisee to go into his cellar to see the antiquity of it, which he did; yet this was adjudged to have been no entry in the disseisee; so if the disseisor had asked the disseisee to go to the house whereof the disseisin was made, to his daughter's wedding, or to dine with him, or the like: So where the plaintiff went into the house to the jury on a view to shew evidence, it was adjudged *not* to have been an entry in him; but, in order to constitute a legal entry, the person so entering must enter with that intent (c), and express his intent to be such (d). For otherwise, where could be that notoriety of possession which the

Insufficient.
What?

[47]

(c) See *Plowd. Comm.* 92, 93. See also *Co. Litt.* 245. b. 368. a. 1 *Mod. Rep.* 10. *Clerk v. Rowell & al.* 6 *Mod.* 44. *Ford v. Lord Grey.*

(d) Or manifest such intention by some overt act. See *Robins. Law of Inherit.* ch. 4. p. 33. note (i), edit. 1755.

law

law so justly requires in cases of this nature? How could an accidental, or unintentional, or secret entry be any evidence to the neighbouring tenants of the right or possession of the person so entering (e)?

But it is not absolutely necessary that the possession be gained by the actual entry of the very person to whom the lands descend: It may be gained by the entry or possession of THE GUARDIAN OR LORD OF THE INFANT HEIR (f); or by the possession

By guardian
or lord.

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(e) See 2 *Bla. Comm.* 209. ch. 14. *Gilb. Ten.* 83. 118. and notes. See also *Kaims's Law Tracts*, ii. & iii. *Sullivan's Lect.* lect. 6. p. 58. *Dalrym. F. P.* 224. &c.

(f) *Fitzh. Abr. Desc.* 12. *Brooke*, tit. *Descent*, 19. *Entre Cong.* 37. *Seisin*, 18. *Dyer*, 291—2. pl. 69. *Co. Litt.* 15. a. and note (4). 29. a. and note (3). *Kitch. of Courts*, 110. a. 130. b. 131. a. &c. 3 Co. 42. a. 9 Co. 106. a. 1 *Comyns's Dig.* 433. *Assize*, (B. 4.) *Co. Compl. Copyh.* sec. 41. p. 95. *Tracts. Noy's Max.* 23. ch. 4. 2 *Inst.* 134. See further, 3 *Wils.* 516. Case of *Newman v. Newman*; and 3 *Viner's Abr. Assize*, (D.) *F. N. B.* 179. F.

And note; the guardian need not be formally assigned. See 3 *Wils.* 528. *Newman v. Newman*. 9 Co. 106. a.

So

session of THE ANCESTOR'S LESSEE FOR Tenant of a chattel interest.
YEARS, TENANT BY ELEGIT, STATUTE-MERGHANT, OF STATUTE-STAPLE (g).
And

So if a stranger enter into the lands of an infant and take the profits, he shall be considered, both at law and in equity, as entering as guardian, and shall be accountable as such. See *F. N. B.* 118. *B. Noy's Max.* 38. *Co. Litt.* 89. a. & b. *Sullivan*, lect. 13. p. 128—9. 1 *Atk.* 489. *Morgan v. Morgan.* and 3. *Atk.* 130. *Dormer v. Fortesque.*

And the entry of such person will make a *possessio fratrīs* in the infant. See 7. *Durnf. & East.* 386. & 390. *Doe v. Keen.* 3 *Wils.* 516. &c. and *Preced. Chanc.* 280. *Whitcombe v. Whitcombe.*

(g) *Co. Litt.* 15. a. 243. a. 3 *Co.* 42. a. *Kitch.* 109. b. 1 *Vent.* 261. *Batmore v. Graves.* 1 *Comyns's Dig.* 433. Assize, (B. 4.) 5 *Ibid.* 443. Seisin, (A. 2.) and (C.) 9 *Rep.* 105. b. *Margaret Pedger's case.* *Gilb. Ten.* p. 158. *Co. Copyh.* s. 41. *Tracts*, 95. and *Supplem.* s. 5. p. 157—8. *Noy's Max.* 23. ch. 4. *Moore*, 125. ca. 272. *Brooke, Seisin*, 18. 36. See 3 *Atk.* 469. *De Grey & al. v. Richardson & al.* 3 *Wils.* 516—528. *Newman v. Newman.* *Jenk. Cent.* 242. pl. 25. See 2 *Inst.* 688—9. 6 *Rep.* 57. b. *F. N. B.* 179. F.

And this, though the heir dies before the day of payment of rent. See the above references, and particularly *Moore*, 126. ca. 272. *Co. Litt.* 15. a. and 3 *Atk.* 469.

F

But

[49]

And as THE POSSESSION OF THE LESSEE
FOR YEARS OR AT WILL IS THAT OF
THE LESSOR (h), so it seems that the
heir

Lease by the
heir before
entry.

But if the ancestor had made a lease FOR LIFE, reserving rent, and the heir receive the rent so reserved; yet such receipt will *not* make POSSESSIO FRATRIS in the heir of such reversion; it being upon an estate of FREEHOLD. See *Co. Litt.* 15. a. and note (5); and *post.* ch. 3. s. 1.

And note; If a common recovery be suffered of lands which are let on leases for years, the recoveror will not have the reversion presently by the judgment, (*i. e.* will not be in the actual possession by reason of such leases for years), but the recovery must be executed by writ, entry, or claim. 2 *Cruise*, 135. ch. 6. cites 1 *Co.* 94. b. 106. b. and see *Moore*, 137. 141. pl. 281. *Shallie's case*. See also 2 *Lord Raym.* 853. *West v. Sutton*.

If a man recover an advowson, and after the bishop collate for lapse, the same is an execution of the judgment, and will make a *possessio fratris*. *P. Moyle*. 22 *Hen.* 6. cited by Anderson, C. J. 1 *Leon*, 234.

See further next note (h), and 3 *Viner*, Assize, (D).

(h) See before note (g), and *ante*, sec. 1. p. 27. 1 *Com. Dig.* 433. Assize, (B. 4.) 5 *Ibid.* 443. Seisin, (A. 2.) 6 *Ibid.* 298. Descent, (C. 9.) *Kitch.* 62. See 3 *Wils.* 516—28. *Buller's N. P.* 104. And see also 1 *Wils.* 176. and 6 *Co.* 57. a. 59. a. *Brediman's case*. *Co. Litt.* 290. b. note (1). 330. b. note (1).

So

heir may make such leases for years or at will BEFORE HIS OWN ENTRY, and so acquire an actual seisin by them; for it appears, upon the whole, pretty clear, that the possession IN LAW ONLY of the heir is sufficient to enable him to make such leases, without any actual entry by himself; as where the lands descend to such heir, and his possession be *unrebutted* by

[50]

So if a REMAINDER be limited on an estate for years, the possession of the particular tenant is the possession of the remainder-man. See (of *Freeholds*) *Litt. sec. 60. and Co. Litt. 49. a. and b. and 239. b. and note (2).* 2 *Bla. Comm. 167. ch. 11.* And see also *post. ch. 3. s. 1.; and ante, p. 21.*

Of *Copyholds*, 2 *Levinz. 107.* 1 *Vent. 260—1.* *Batmore v. Graves.* 6 *Vin. Copyh. (P. b.) (C. e.) pl. 15.* 2 *Com. Dig. 391.* *Copyh. (G. g.) and ante, p. 21. note (w).*

So the entry of a DEVISEE for YEARS will make POSSESSIO FRATRIS. See *Jenk. Cent. 242. pl. 25.* See it also in 7 *Vin. Abr. 585. Descent, (K). pl. 34.* and 36. and in *Co. Litt. 15. a. note (4).* See also *Dyer, 342. pl. 54. Towers v. Burrows. and Brooke, Feoffm. al Uses, 33. and Descent, 36. Fitzh. Abr. Subpœna, 3. 3 Leon. 25. ca. 53.*

Devise to executors to pay debts, they have a *chattel interest*. See 8 *Co. 96. a. Co. Litt. 42. a. Cro. Elix. 316. Cordal's case. 2 Vern. 403. Hilchins v. Hilchins.*

[51]

the actual seisin of any other person: but if another *abates*, so as to *rebut* such presumed or legal seisin, the heir having now neither a seisin in law or deed, and, consequently, no possession at all, cannot possibly be able to make any leases of such lands (*i*).

Tenant by
copy.

ACTUAL SEISIN may also be gained by the possession of A TENANT BY COPY OF COURT-ROLL *whether such tenant be for YEARS, LIFE, OR IN FEE (k)*. For copyholds were originally, and yet are in the eye of the law, only tenancies at will; the freehold remaining in the lord (*l*): and
of

(*i*) See *Noy's Max.* ch. 34. *Plowd.* 87. 137. 142. 5 *Com. Dig.* 443. Seisin, (A. 2.) *Bacon's Abr.* Lease, (I. 5.) *Brooke, Lease*, 57. *Touchst.* 269. 2 *Strange*, 1086. *Berrington v. Parkhurst & al.* and see *Gilb. Ten.* 159—60.

See *post.* 57. a. N. (*s*), of an Entry by Attorney.

(*k*) See 9 *Rep.* 105. b. 106. a.

(*l*) See 3 *Levinz.* 94. See it also in 6 *Viner's Abr.* Copyh. (A.) *pl.* 9. *Gilb. Ten.* 160. 4 *Co.* 22. a. Brown's case. 23. b. *Clarke v. Pennyfather.* 2 *Inst.* 325. *Co. Copyh.* sec. 14. *Tracts*, 11. See 3 *Burr.* 1273—9. *Stephenson v. Hill.*

See

of copyholds there may be a POSSESSIO FRATRIS before admission (m). [52]

So the entry of one COPARCENER, JOINT TENANT, OR TENANT IN COMMON, is sufficient to make POSSESSIO

Coparceners,
&c.

See 1 *Blackst. Tracts, Consid. on Copy.* and 2 *Com.* 147. ch. 9. who says, that some copyholders have a freehold interest, but not a freehold tenure: (for if they had a freehold tenure, how could they be considered as copyholders?) But these are usually denominated customary freeholders, and not merely copyhold tenants who hold "at the will of the lord." See *Co. Litt.* 59. b. and note (1). 9 *Co.* 76. b. *Combe's case.* *Carth.* 432. *Gale v. Noble.* 3 *Salk.* 100. *Page v. Smith.* and in *Dig. Ca. K. B.* 433. *Estates.* 2 *Lord Raym.* 1225. 1232. *Crowther v. Oldfield.* And see 3 *Burr.* 1273—8. *Stephenson v. Hill*, where it is said, that the freehold, even of these estates, is in the lord of whom held. See also *Calth. Read.* 51. 54. edit. 1635.

(m) *Dyer*, 291. pl. 69. *Lex Custumaria*, ch. 17. p. 154—6. *Cro. Car.* 411. *Reeve v. Malster.* 4 *Co.* 22. b. *Brown's case.* 23. b. *Clarke v. Pennyfather.* *Gilb. Ten.* 159. 2 *Com. Dig.* 379. *Copyh. (D. 1.)* 388. (G. 1.) 6 *Vin. Abr. Copyh. (D. b.)* and (C. e.) *Co. Copyh.* s. 41. *Tracts*, 94. (see it.) *Supplem.* s. 5. p. 157. *Kitch. Courts*, 60. a. 81. b. *Moore*, 125—6. ca. 272. *Calth.* 64. 87—8.

For it is the entry and not the admittance which makes a *possessio fratrís* of copyholds. See 1 *Freem.* 45. *Foxe v. Smith.* and *post.* p. 63. N.

[59] FRATRIS in the others who did not enter, to the exclusion of the half-blood (n). So the

(n) *Hob.* 120. Smales and Dale. *Moore*, 868. *pl.* 1201. S. C. and see *Moore*, 546. *ca.* 729. Hemley v. Brice. See also *Dyer*, 128. *pl.* 58. Ballard v. Ballard. Who *quaries*, "*Si l'entre del eigne Fitz, (en Gavelkinde Terre), done seisin a les autres ou nemy? Quod* (he adds) *est difficile a l'estranger, ut credo.*" And see *Robins. on Gavelk.* b. 1. c. 6. p. 113. who observes on this case in *Dyer*, that the stranger holds in common with the heirs, and must plead and be impleaded by a several *prapice*: And it is a general rule, he adds, that, where there are several actions, there must be several entries, and, therefore, the entry of the heir will not give seisin to a stranger. But *quare* as to this: For, though all tenants in common must be impleaded by several *prapices*, (*Co. Litt.* 195. b.) yet it appears, from the cases cited from *Moore* and *Hobart*, that where the heir and devisee were tenants in common, the one by descent, and the other by purchase, the entry of one alone caused a *possessio fratris* in the other.

See further 1 *Lord Raym.* 632. Fisher & Wigg, *Co. Litt.* 373. b. 5 *Burr.* 2607. Fairclain d. Empson v. Shackleton. *Jenk. Cent.* 42. *pl.* 79.

If there are several coparceners, and one only present to an advowson, it will not put the others out of possession; but the possession of one, by her clerk, shall be the possession of all; so that the others may bring a *Quare Impedit*. *Dyer*, 259. *pl.* 20. 2 *Inst.*

the possession of one is the possession of the others to several other purposes (o). [54]
But the entry of one will not vest the estate and possession in the others if it would be for their *disadvantage* (p). [55]

365. *F. N. B.* 34. I. U. *Bro. Quare Imp.* 52. 108. 139. *Co. Litt.* 243. a. 17 *Vin.* 405. *Presentm.* (K. c.)

And such also seems the law as to joint-tenants. 2 *Inst.* 365. *Bro. Quare Imp.* 3. *Co. Litt.* 186. b. 17 *Vin.* 404. *Presentm.* (K. c.) *pl.* 1.

But see *contra*; *Bro. Quare Imp.* 51. *F. N. B.* 35 W. and *Vin. ubi sup.* Yet the law and the reason of the thing seem in their favour.

And it is said to be the same as to tenants in common. See 1 *Anders.* 63. But *quare* as to this: and see 17 *Vin.* 405. *Presentm.* (K. c.) *pl.* 2. and *Bro. Present. al Esglise*, *pl.* 1.

(o) See *Brooke, Remitter*, 16. *Seisin*, 44. *Gilb. Ten.* 29. *Litt. s.* 398. *Co. Litt.* 243. b. 373. b. *Hob.* 120. *Smale & Dale. Robins. Gavelk.* b. 1. ch. 6. p. 113.

"To several purposes," but not to all. See *Brooke, Coparcener*, 8. *Dyer*, 128. *pl.* 58. *Ballard v. Ballard. Gilb. Ten.* 28. and next note (p).

(p) *Brooke, Coparcen.* 1. *Entre Cong.* 9. *Voucher*, 23. See *Finche's L.* b. 2. ch. 3. p. 118—19. and *Co. Litt.* 253. b.

Brother or
sister.

SO THE ENTRY OF A YOUNGER BROTHER OR SISTER, (although they are but of the HALF-BLOOD,) is the possession of the eldest brother, or other sisters (*q*).

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And it seems that such entry will make POSSESSIO FRATRIS VEL SORORIS in the heir at law, even though it be to the exclusion of the very person who enters (*r*).

By a stranger.

And as a possession may, in many cases, be gained by THE ENTRY OF AN INDIFFERENT PERSON IN HIS NAME, AND TO HIS USE, WHO HAS RIGHT; and this often by mere oral authority, and sometimes even without any expressed authority at all (*s*);

so

(*q*) See *Gilbert's Tenures*, 28. 158. *Litt. sec.* 396. *Co. Litt.* 242. a. & b. *Plowd.* 306. a. See *Hale on Fitz. Nat. Brev.* 166. (L.) p. 455. note (*a*). *Bull. Nisi Prius*, 102. *Jenk. Cent.* 242. *pl.* 25. See it also in 7 *Viner's Abr.* 585. Descent (K.) *pl.* 34. and 36. and in *Co. Litt.* 15. a. note (*q*). See also *Jenk. Cent.* 42. *pl.* 79. And the books cited *ante*, N. (*n*).

(*r*) See *Jenk. Cent.* 242. *pl.* 25. *Ibid.* 42. *pl.* 79. *Plowd.* 306. And see notes (*n*) and (*q*) before, and the authors there referred to.

(*s*) Thus an husband may desire any person who liyes near where the lands lie, to enter in the name of

of

so it seems that THE ENTRY OF A PERSON Attorney.
 PROPERLY DEPUTED will be sufficient to [37]
 give

of himself and wife; and the entry of such person will, it seems, be sufficient to entitle the husband to his curtesy (1). So if a person enter, without any previous authority, in the name of him who should enter for condition broken, it will vest the estate in him to whom it was limited on the breach of such condition, so as to maintain an ejectment; if it be assented to before the day of the demise laid in the declaration (2). So a stranger may enter, and it shall avoid a fine, though levied with proclamations, if the entry be by precedent command, or be afterwards assented to; but not otherwise (3). So if a person enter for a forfeiture in the name of him in reversion, though without express authority (4). So, generally, if a person enter in the name of him who has right, even though it be without a precedent command or subsequent assent; and whether he who has right be an infant, or of full age, it shall vest the freehold in him who has such right.

(1) *Perkins*, s. 470. and see s. 464. And see *Preston on Estates*, 485.

(2) See 2 *Strange*, 1128—9. *Fitchett v. Adams*. And a verbal assent is sufficient, (*Fitchett & Adams*); But it is absolutely necessary that an assent be given. See *Cro. Jac.* 56. *Curties v. Wolverston*.

(3) *Brooke, Entre Cong.* 123. 9 *Co.* 106. a. See *Co. Litt.* 258. a. 1 *Cruise*, 307. 2 *Com. Dig.* Claim, (B. 2.)

(4) *Brooke, Seisin*, 21. and see 2 *Strange*, 1128—9. and *Brooke, Entre Cong.* 123. and *Co, Litt.* 245. a.

give an actual seisin, and make a POSSESSIO FRATRIS in him by whom he is so deputed (t). But we may observe that POSSESSIO

right (5). So the possession of the husband is the possession of the wife, and *e converso* (6), &c. &c. &c. &c.

(t) See *Litt.* sec. 432. *Co. Litt.* 257. b. 258. a. 9 *Co.* 75. Combes's case. *Gilb. Ten.* 37. *Plowd.* 93. 1. *Cruise*, 307. See *F. N. B.* 179. G. p. 414. 4to edit. 1755.

Et par ceo si tielx heires issi seisis par eux, ou par procuratours, ou par baillyfs, ou autres, que en lour nosme serrount mys e. seisine, soient engettes par autres que p. nous de quel age que ils soient, si volons que ils. recoverount par ceste assise, &c. *Vide Britt. cap.* 42. *De Disseisine*, 107. a. (232).

And, indeed, when we consider that an ACTUAL SEISIN is necessary to be given and received by the respective parties, in order to give effect and consummation to a *feoffment*, and that such seisin may be taken BY ATTORNEY (1), (constituted by deed) (2), as well

(5) *Perk.* s. 48. *Brooke, Seisin*, 50. *Co. Litt.* 245. a. 258. a.

(6) 8 *Co.* 44. a. See *Bro. Seisin*, 17. *Perkins*, s. 46. 470. 464. 1 *Roll. Abr.* 314. *Avowrie*, (D.) pl. 6. 5 *Com. Dig.* 444. *Seisin*, (C.) 5 *Com. Dig.* 167. *Pleader*, (2 A. 1.) *Co. Litt.* 29. a. *Noy's Max.* 82. *Post. sect.* 3.

(1) See *Co. Litt.* 48. b. 49. b. 52. 2 *Comm.* 315. ch. 20. 3 *Com. Dig.* 341. *Feoffment*, (B. 3.) *Kitch.* 137. *Brooke, Feoffments*, 67. And see 5 *Co.* 94. b. 95. a.

(2) See *Co. Litt.* 52. a. and note (1.); 48. b. and note (2). *Kitch.* 137.

SESSIO FRATRIS is not much favoured (u):
and a stricter seisin is requisite to make
such

well as in person, so as to fix the actual possession in the feoffee; may it not be asked, Why should not the entry by a person lawfully authorized fix the actual possession in the heir? Why may he not thus receive the seisin necessary on a *descent*, as well as that which is requisite on a *purchase*? Or as well as recover the actual possession of lands of which he had been *disseised* (3)? Or as make a *continual claim*; which will amount, in many cases, to an actual entry (4)? If he can recover the ACTUAL POSSESSION of lands of which he has been DISSEISED, BY ATTORNEY, why may he not obtain actual possession, by attorney, of lands *whereon a stranger has ABATED*? In either case he has a right and title to enter (5). And if he can thus recover an actual seisin of lands, when such actual seisin IS IN ANOTHER, why may he not enter
by

(u) Per Gould and Blackstone, *Justices*. 3 Wils. 520. See 3 *Atkins*, 471. *De Grey v. Richardson*. 1 Ves. 177. *Cunningham v. Moody*. 2 P. Wms. 735—6. *Cowper v. Earl Cowper*.

And note: It is always *intended or presumed*, that a person claiming is of the *whole-blood*, till the contrary be shewn. *Kitch*. 225. a. and *Plowd*. 77. a. *Trin*. 19 Hen. 8. pl. 6. fol. 11. b.

(3) See *Co. Litt.* 48. b. and note (6).

(4) See *Litt.* s. 432. &c. *Co. Litt.* 257.

(5) *Co. Litt.* 258. a. and see *Ibid.* 237. b. 238. *Bla. Comm.* 175. ch. 10.

[59] such POSSESSIO FRATRIS than even to maintain a writ of right (x).

Act of
ownership.

However, Mr. Robinson conceives that, in all cases, WHERE THE HEIR EXERCISES ANY ACT OF DOMINION OVER THE INHERITANCE, (as by repairing houses, fences, &c. or by receiving rents, see *ante*, p. 48.) it will amount to an actual entry (y).

[60]
Recovery.

We have before observed (z), that if an elder brother SUFFER A RECOVERY, and

by attorney where the possession is VACANT, and so no one to suffer? If another enter in the name of the heir, is not there an equal notoriety as if he had entered himself? It has been repeatedly said, that an ACTUAL ENTRY is necessary to avoid a fine levied with proclamations (6); and yet we have seen (7) that such entry *may* be by attorney.

(x) See *Co. Litt.* 281. a.

(y) *Law of Inheritances in Fee-Simple*, &c. 33. note (i), ch. 4. cites 1 *Leon.* 265. and *Co. Litt.* 15.

(z) *Ante*, sec. 1. p. 18. note (p).

(6) See 2 *Com. Dig.* 302—3. Claim, (B. 1.) 6 *Ibid.* 260. *Cruise on Fines*, 304. 2 *Strange*, 1086. *Berington v. Parkhurst & al.* *Douglas*, 483. *Goodright v. Cator.* *B. N. P.* 103. 1 *Mod.* 10. *Clerke v. Rowell.* 3 *Burrow*, 1897. *Dates d. Wigfall v. Brydon & al.*; and *post.* 113. N. (y). *Jenkins d. Harris & Ux. v. Prichard & al.*

(7) See p. 57. note (3.)

die,

die, AND NO EXECUTION BE SERVED, it will NOT make a POSSESSIO FRATRIS in him to cause the sister to inherit, to the exclusion of the half-blood ; for till execution served, the recovery does not operate.

If the hereditaments claimed be IN-
CORPOREAL, IT IS REQUISITE, in order
to give seisin of them to the heir, so as
to make HIM the stock of descent,
THAT HE ACTUALLY RECEIVE THE
RENT, PRESENT TO THE ADVOW-
SON, &c. (a), (unless such advow-

Of incorpo-
real heredi-
taments.

(a) See *ante*, sec. 1. p. 23. And see also *Co. Litt.* 15. b. *F. N. B.* 36. (E.) *Kitch.* 109. It was said by the Master of the Rolls, (Sir Joseph Jekyll), in the case of *Penville v. Luscomb*, (*Mosley's Rep. Temp. King.* 72.) that, in order to make a *possessio fratris* of an equity of redemption on a mortgage in fee, the elder brother should have brought his bill against the mortgagee ; or the mortgagee should have paid him the rents and profits. And, therefore, where the father made a mortgage in fee, and died after forfeiture, leaving a son and a daughter by one wife, and a son by another, and the eldest son died without bringing his bill, his Honour decreed the equity of redemption to the younger brother.

son,

son, &c. BE APPENDANT OR APPURTENANT TO A MANOR, &c. of which he has already obtained AN ACTUAL SEISIN). For though, as we have seen (b), a seisin *in law* in incorporeal hereditaments will, in some cases, entitle an husband to his curtesy, yet it will *not* be sufficient to turn the descent, but AN ACTUAL SEISIN must be acquired.

[61]

Appendants
cies and inci-
dents.

If an advowson BE APPENDANT OR APPURTENANT TO A MANOR, then ACTUAL SEISIN OF THE MANOR WILL (as before hinted) GIVE ACTUAL SEISIN ALSO OF SUCH ADVOWSON AS ITS APPENDANCY (c). But if a person be disseised of a manor whereto an advowson is appendant, he may, notwithstanding, present to the advowson before he regain the seisin of

(b) *Ante*, sec. 1. p. 39.

(c) See *Co. Litt.* 15. b. note (1); 29. a. note (4); 49. a. *Gillb. Ten.* 18. and *F. N. B.* 36. (E. and F.) *Co Litt.* 333. b. 349. b. 363. b. *Hobart*, 126—7. *Chancellor of Cambridge v. Walgrave*. See 1 *Strange*, 54. *Newman v. Holdmyfast*. 2 *Strange*, 1011—12. *Rex v. Episc. Landaff*. *Moore*, 90. *pl.* 223. *Playre v. Crouch & al.* See *post.* sec. 4.

the

the manor (*d*). And as seisin of the principal is seisin of the accessory, so the recovery of, or remitter to, the principal, is the recovery of, or remitter to, the accessory also; but not *e converso* (*e*). And, therefore, if another, during such disseisin, usurp such presentation, yet, on his remitter to the manor, such usurpation is purged, and he shall be remitted to the advowson also (*f*). But though recovery of the principal will restore him to the seisin of the accessory, yet the exercising any act over the accessory will not give him seisin of the principal: and, consequently, if A. be disseised of a manor to which an advowson is appendant, and dies before recovery, leaving a son and a daughter by one ventre, and a son by

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(*d*) See *Co. Litt.* 122. b. 307. a. 333. b. *F. N. B.* 33. Q. *Bro. Present. al Esglise.* 30. *Fitz. Abr. Present. al Esglise.* 13.

(*e*) See *Co. Litt.* 151. b. 152 a. N. (3). 349. *Bro. Present. al Esglise.* 30. and see also *Co. Litt.* 15. a. and N. (3). and *ante*, sec. 1, p. 49. (*f*).

(*f*) See *Brooke, Presentement al Esglise*, 31, 32. 1 *Lord Raym.* 302. *Rex v. Bish. of Chester.*

another,

another, the eldest son (g) present to the advowson, but before he recover the manor die, after whose death the younger son enter into the manor, as the now heir of his father, he shall be entitled also to the advowson (subject to his brother's clerk); and the presentation of his elder brother shall not sever such advowson from the manor, so as to render it an advowson in gross; nor, consequently, make a POSSESSIO FRATRIS to cause the sister to inherit: but the younger son, on recovering the manor, shall recover also such advowson as its accessory (h).

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Rents and
services.

As to the methods of gaining seisin OF RENTS AND SERVICES, I must content myself with referring to the books cited in the margin; as the whole would be too much to transcribe, so the insertion of one

(g) See *Fitzh. Abr. Quare Impedit.* 179. *Co. Litt.* 333. b. 17 *Vin.* 341. Presentation. (R. a.) *pl.* 9.

(h) See *Brooke, Present. al Esglise*, 30. *Co. Litt.* 29. a. and note (4). 306. b. 307. a. 349. b. 363. And see *Ibid.* 151, 152. and 3 *Wils.* 526—7. and *Trin.* 9 *Hen.* 6. 25. a.

part,

part, relative to the matter in hand, would be doing injustice to the other (*i*).

If the hereditaments descending be IN REVERSION OR REMAINDER EXPECTANT UPON AN ESTATE OF FREEHOLD, the heir may obtain what will be equivalent to AN ACTUAL SEISIN of them, so as to turn the descent and cause A POSSESSIO FRATRIS, BY GRANTING THEM OVER FOR LIFE OR IN TAIL. But of this more will be said in a future chapter (*k*). Reversions on freeholds.

(*i*) See 4 Co. 8, 9. Bevil's case. Co. Litt. 68. a. 153. a. 315. a. Litt. Sec. 235. Jenk. Cent. 284. pl. 14. Cro. Jac. 142. pl. 20. Brediman v. Bromley. 6 Co. 57. F. N. B. 177. Brooke and Fitzh. Assize. 2 Brownlow, 99. 5 Com. Dig. Seisin, (C). 3 Viner, Assize.

(*k*) See *post.* ch. 3. sec. 1.

If A. dies, leaving a son by one wife, and a son and a daughter by another, and the widow be endowed of a moiety by the custom, (the lands being copyhold, descendible to all the sons, in the nature of gavelkind,) and the two sons be admitted to the reversion of the moiety of which the widow was endowed, and the son by the second wife die, the admittance shall not cause a *possessio fratris* in him, so as to make his sister take. See 1 Freem. 45. Foxe v. Smith. So note; it is the entry, and not admittance, which makes a *possessio fratris* in copyholds. See 3 Leon. 69. Case 106. See Kitch. 60. b.

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SECT. III.

How an actual Seisin may be defeated.

Disseisin.

A right descending.

Half-blood.

WHEN a person has obtained an actual seisin of lands, &c. he may again BE OUSTED OF THE FREEHOLD (a), by the wrongful act of another individual; and this is termed A DISSEISIN. By such disseisin the actual possession is in the disseisor, and the disseisee has but a right. But such right would regularly descend to his heir at law, in the same manner as if clothed with the possession: but if the disseisee had died, and the right descended to his heir, and such heir had died also, leaving a brother of the half, and a sister of the whole-blood, and without having

(a) See 1 Burr. 107. Taylor d. Atkyns v. Horde & al. Cowp. 701. S. C. Co. Litt. 181. a. Terms de la Ley. Disseisin. 3 Bla. Comm. 169. ch. 10.

And the disseisor gains the fee. See ante, sec. 1. p. 2. N. (c).

ever

ever recovered the possession of the premises; the brother of the half-blood would succeed to the inheritance, and not the sister of the whole. For such heir having had only a right, and no actual possession or seisin, he could not have turned the descent: So that, on his death, the person should succeed who could make himself heir, not to such heir of the disseisee, but to the disseisee himself; he being the person who was last actually seised. For though the disseisin deprived him of the actual possession or seisin, yet it only related to the time of such disseisin made; and would not have relation to any prior event: so that as he was once actually seised, that actual seisin shall not be *ab initio* defeated; but the pedigree shall run, and the claim be made from him, as being so seised.

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But there is yet a mean by which the actual seisin or possession of him who has succeeded to an inheritance may, as to the portion to which such mean shall extend, be not only taken out of him from

Seisin defeated *ab initio*.

the time of the operation of such mean, but shall be absolutely, and *ab initio*, destroyed; and so as to have relation to the estate of a precedent possessor, and utterly defeat the seisin or possession of the person so seised: and this is by THE ENDOWMENT OF THE WIDOW of such precedent possessor.

By dower.

Dowager is
by her hus-
band.

[66]

For by the endowment of such widow, (for instance, the mother of the heir,) she is *in* from her husband, and not from the heir; and her estate is, as it were, the continuance of that of her husband (*b.*) So that, during her posses-

(*b.*) And by reason of this relation to the estate of her husband, it is, that a remainder limited on an estate in dower, (as where the heir endows his mother, and, at the same time, limits a remainder over to another,) is void: for as the particular estate, and the remainders limited thereon, must form together but *one* estate, the remainder limited on an estate in dower cannot be good: as the estate in dower arises from, and has relation to, that of the husband, and reference to his death; and the remainder proceeds from the heir, and arises from the grant made by him: so that such heterogeneous portions can never form *one* estate. See *Plowd.* 25. *Finche's L. b. 1. c. 3. p. 13.*

sion

sion (c) of the third * part of such lands as her dower, the heir can have NO ACTUAL SEISIN OF SUCH THIRD, so as to make A POSSESSIO FRATRIS. His entry being thus destroyed, and the widow in from her husband, he has only the reversion of such third; and such reversion being on an estate of freehold, he can have no actual seisin of it, as we shall presently evince. So that if the elder brother enters, and then endows his mother, and dies, the brother of the half-blood shall have the third so given in dower (d). So

Reversion.

[67]

Not subject
to *possessio*
fratris.

Dower.

(c) The freehold is not in the widow till she enter into the lands assigned, or *the seisin be actually delivered by the sheriff*. See *Co. Litt.* 32. b. 37. a. N. (1). Hale's MS. *Litt.* s. 393. *Maintenant apres ceo que la Feme ENTER ET AD LE POSSESSION de mesme la Tierce part, &c.* *Dyer*, 278. a. *pl.* 4. *Perk. S.* 423. *Dr. & Stud. b. 2. ch.* 13. *Ante*, 50. N. (f), and *post.* 80. 83. and see *Bull*, N. P. 104. at bottom.

* Note; the *third* part of the lands is mentioned here only by way of example; for what is said is equally applicable to whatever *portion* the widow takes.

(d) *Co. Litt.* 15. a. 31. a. 240. b. 241. a. *Litt.* s. 393. *Brooke, Descent*, 19. *Dower*, 87. 100. *Mordancest.* 3. 6.

if he enter, endow her, and die, his own wife shall not be endowed of such third(e).

Or curtesy.

Or if the heir be a daughter, and she enter, and endow her mother, and die, her husband shall not be tenant by the curtesy of it(f). So where there are grandfather, father, and son, and the grandfather dies; the father dies, (either before or after entry,) and the son enters and endows his grandmother; his and his father's seisin is destroyed; (and if there had been twenty descents, alienations, or disseisins, they would all be defeated;) and the son has only a reversion on an estate of freehold,

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(e) See *Co. Litt.* 31. a. and b. *Brooke, Seisin*, 18. 4 *Rep.* 122. a. Paine's case, cited. *F. N. B.* 149. H. *Perkins*, s. 301. 315. And see *Fitz. Abr. Dower*, 49. 166. 170.

See *Fitz. Abr. Dower*, 130. *contra*, which cites *M.* 23. *Ed.* 3. But there is no such case in the printed Yearbook of that term.

But see *M.* 24. *Ed.* 3. *pl.* 18. *fol.* 32. b. 33. a. and *pl.* 80. *fol.* 70. b. 71. a. where it appears that the opinion of the court was, that the widow of the father was in by her baron, and so the seisin of the son, as to such third, defeated.

(f) *Kitch. Courts*, 159. *Brooke, Ten. par le Curtesie*, 10.

as

as has been said: for by the endowment of the grandmother, every mesne estate was defeated (g). Mesne seisin defeated.

But we must be mindful to observe, that it is the possession of the widow of such third AS HER DOWER (h), that thus defeats Widow possessing the third as dower.

(g) "*Et non alloc.*" Car mesq. xx. fuer. ssis. pu: la Mort le Bar. unc. l'entr. la Fee. serr. sup. p. le Bar. qnt. ele est eins in Estat. de Dow. M. 24. Ed. 3. pl. 18. f. 33. a.

Bro. Mordancest. 3. Co. Litt. 31. a. and b. See 2 Inst. 154. Perk. s. 315, 316. 4 Co. 122.

Yet this shall not defeat the estate of a bastard *eigne*; and, therefore, if the bastard die seised, and his issue endow the widow of the bastard, or the widow of the bastard's father, yet the estate in dower shall not have relation so as to defeat the estate of the issue as to such third; for the dying seised of the bastard, and the descent to his issue, established his title to the whole; and, being once fixed in the issue, the law will not permit it to be afterwards defeated; or the legitimacy of the bastard called in question after his decease. 8 Co. 101. b: Co. Litt. 244. a. and vide Gilb. Ten. 29. &c. and Watk. N. xxvi. and 1 Salk. 120. Pride v. Earls of Bath and Montague.

(h) But note: If the heir assigns dower of lands of which the husband was seised, but of which the wife was not dowable, yet she is *tenant in dower* of the

feats the seisin of the heir. For when she possesses it *as her dower*, she is *in*, as we have said, from her husband, and her estate is, as it were, the continuance of his:

Not as her
dower.

But if she possesses it (either by itself, or with the other parts) *in any other manner* than as her dower, the seisin of the heir will *not* be thereby destroyed: as if, after the death of her husband (*i*), and before endowment, she accepts a lease for life, or years, of the heir (*k*). For she is now *in* of

[69]

Acceptance
of lease by
the dowress.

lands assigned. *Finche*, L. b. 1. ch. 3. p. 36. *Co. Litt.* 34. b. note (9). *Hale's MSS.*

So if the widow be endowed, and afterwards exchanges with the heir for other lands, yet she is *tenant in dower* of the lands so *taken* in exchange, and shall be *in* of them by her husband. *Hale's MSS.* as above.

(*i*) For if she accepts such lease *during the life of the husband*, it will be no bar of her dower; as, while he is living she can have only a title to dower, and not an immediate right. Beside, she being under coverture, her acceptance is not conclusive, but waivable after his death. See *Jenk.* 15, 16. *pl.* 27.

(*k*) *Perkins, Dower*, s. 350. *F. N. B.* 149. (*E.*) *Kitch.* 160. See *Brooke, Dower*, 27. *Jenk. Cent.* 73. *pl.* 38.

So if she accepted the guardianship of the heir in chivalry, she was barred during his non-age; *i. e.* while

of *her own* estate, which can have no relation to that of her husband, so as to coalesce with, and constitute a continuance of, his estate. And as the heir had gained an actual seisin of the whole, these estates (for life or years) are portions of *his* interest, and not derived from an interest which was anterior or paramount to his own: so that his seisin will not be thereby defeated; but the person claiming on his death must make himself heir to him, as of the person last seised.

If the lease so accepted by the widow [70] be for *her life*, it will be an absolute and For life. effectual bar of her dower for ever: for as she is already possessed of the lands, how can she demand them? She cannot demand them against herself (*l*). Besides, as she voluntarily accepted such lease, she shall be estopped and concluded by her own act. If the lease be *for years* only, For years.

while the guardianship continued. See *Brooke, Dower*, 27. and 42. *Hale on F. N. B.* p. 350. note (*b*). See further *Jenk. Cent.* 15, 16. *pl.* 27. and 73. *pl.* 38.

(*l*) *Perkins*, s. 350.

it

it seems that she may again demand her dower when such term is expired (*m*) ; for between the expiration of the term and her own death, (for when we say that the widow may demand her dower *after* the expiration of the term, it must necessarily be supposed, that she be then living ; for otherwise she could not demand it at all,) there must have been a time when the heir possessed the lands from which she was not then excluded from demanding her dower. If, therefore, the widow recovers her dower after the expiration of the term, it seems to follow, from the principles already

[71] laid down, that the estate then obtained shall have immediate relation to that of her husband ; so that such her estate will be paramount to the title of the heir, and defeat the seisin he at first gained, and which continued during the term, and put him in the same situation, with respect to such third, as if he had never been seised at all. And in case the immediate

(*m*) See *Fitz. Nat. Brev.* 149. E. and *Kitch. Courts*, 160. b. And see also *Perk. s.* 350. *Brooke, Dower*, 27. and 42. and *ante*, p. 69. note (*k*).

heir

heir of the husband had died during the continuance of the term, and the lands had descended to *his* heir, and if *he* had left a son and a daughter by one wife, and a son by another, the son by the first wife, being his heir when he died, would, of course, have succeeded to the inheritance. And in case this first son had died also, during the continuance of the term, without issue, the daughter would have inherited the lands: for, as the term existed, the son by the first ventre *had* a seisin sufficient to make a POSSESSIO FRATRIS (*n*); for as the widow could not yet have recovered her dower, his seisin could not yet have been defeated. But had the lands thus descended to the daughter, and, during the estate of such daughter, the term had expired, and the widow had recovered her dower, and died in the daughter's life-time; or, during the continuance of the term, the daughter had died, leaving a son; and, in his life, the widow had recovered her dower; now,

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(*n*) See *ante*, sec. 2. p. 48.

though

though the daughter was, at the death of her eldest brother, and during the continuance of the term, (while she lived,) the person entitled by law to the estate, and in the actual possession of it; yet, by the recovery of dower by the widow, the seisin of her eldest brother and herself in the one case, and of her brother, self, and son, in the other, shall be destroyed: so that, in the first case, she herself, and in the second, her son, shall be excluded from the inheritance of the third so recovered; and the brother (or uncle) of the half-blood shall be heir to it (o).

Lease to a stranger for life by the heir, against whom dower is recovered.

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Possessio fratris.

But if the heir enter on the death of his ancestor, and, *before* endowment, he lease the whole lands to a stranger *for* LIFE, against whom the widow recovers her dower, and afterwards the heir dies, the sister of the WHOLE-BLOOD shall have the reversion in fee, and not the brother of the half-blood: because the heir (or eldest son) had altered the reversion by his lease

(o) See *post.* ch. 3. sec. 1.

for

for life; and the tenant in dower left the reversion in the lessee (*p*). So had the heir made such lease *after* the recovery of the widow, though there remained but a reversion on a freehold in the heir, (as to such third,) yet, on his lease of the whole lands, such reversion would pass (*q*); and, consequently, by such lease for life of the reversion, a POSSESSIO FRATRIS would be made (*r*).

(*p*) See 8 Co. 35. b. Co. Litt. 15. a. and the books cited.

(*q*) See Plowd. 155. 161. 433. 10 Co. 107. a. and b. Pasmer's case, cited. 1 Leon. 180. Howe & Conney.

(*r*) See *post.* sec. 4. and ch. 3. sec. 1.

But had he leased them for the life of the lessee, and died before him; or had he leased them for *his own* life, *his* widow would *not*, by reason of such alienation, be entitled to dower on the death of the first widow, who recovered against him, of the third assigned to her. For, notwithstanding the alienation, it would still continue a reversion on a *freehold*; and, consequently, not subject to the dower of his wife. See Bro. Desc. 19. and Seisin, 18. cites 19 Ed. 2. (*Vide Pasch.* 19 Ed. 2. p. 662. *Mayn.*) and Fitz. Abr. Dower, 166.

But

Heir apparent taking
by purchase;
against whom
the widow
recovers
dower.

But when it is said, that the seisin of the son is destroyed by the endowment of the widow, it must be understood that the son took the estate BY DESCENT: And as to the subject of descents, this is sufficient to our purpose. But as there is a difference in this respect with regard to dower, between a descent and purchase, and as we have already spoken so much on that head, it may not be improper to notice it here. Thus, if the grandfather [74] had ENFEOFFED the father, or made a GIFT IN TAIL to him, the wife of the father, after the decease of the wife of the grandfather, should have been endowed of the part assigned to the grandmother equally as of the other two-thirds; because THE PURCHASE OR GIFT that took effect IN THE LIFE OF THE GRANDFATHER (*before* the title of the grandmother was consummated) is not defeated *ab initio*, but only *quoad* the grandmother, as to such third. But had the father taken BY DESCENT, he could not have been entitled TILL THE DEATH OF THE GRANDFATHER;

THEY; at which time the title of the grandmother *was* consummated; and so, on the recovery of it, formed one estate with his. But as the purchase took effect in the lifetime of the grandfather, there was a time when the father was seised of the premises so as not to be defeatable by the grandmother, of which seisin his wife might have been endowed; as the grandmother's recovery of her dower would only relate to the *death* of the grandfather; so that when she recovered it, it *would* divest or defeat the seisin gained BY DESCENT, but *not* that gained BY PURCHASE, saving only as to *her own* estate (*s*).

[75]

And again: If the wife of the father be endowed by the son *before* the wife of the grandmother, and then the grandmother recover against the mother, yet it is said that the mother shall enter again on the death of the grandmother: for the estate for the life of the grandmother was less, in the eye of the law, than the estate for her

Mother endowed before the grandmother.

(s) See *Co. Litt.* 31. a. and b. and 4 *Co.* 122. a. and b.

own life (t). But if, on the recovery of the grandmother, her estate so recovered shall have relation to that of her husband, and, consequently, defeat the seisin of the father, will it not destroy also the dower of his wife? As dower is only of such estate of which the husband was SEISED (u), does not the dower of the wife depend upon the seisin of the husband? And if the seisin of the husband be defeated by the endowment of the grandmother, is it not the same as if he had never been seised at all? And if he had never been seised at all, how could his widow recover or claim her dower? If the father had been seised, and then the grandmother had been endowed, it would certainly have defeated his seisin as to the third assigned; and, if the father had died in the life-time of the grandmother, he could have had no seisin at all of the third so recovered, his first seisin being thus destroyed; and conse-

(t) See *Co. Litt.* 31. b. *Perkins*, sec. 316.

(u) *Ante*, sec. 1. p. 36. 37.

quently,

quently, his widow could not have been endowed (*x*).

The reason given by PERKINS (*y*) for the mother's re-entry on the grandmother's death is, because being endowed by, or having recovered against, the son, she shall now hold against him; for, by his endowing her, he acknowledged her right, and therefore shall not be permitted to claim against his own act. But as the mother could not be endowed *before* the father's death, and the grandmother recovered against her afterwards, her estate so recovered had relation to that of the grandfather, and so defeated the father's seisin: so that he having had his seisin destroyed, her holding this *as her dower* must be considered in a light very similar to that in which she is said to hold in dower where the heir assigns her a third of lands to

[77]

(*x*) See *Co. Litt.* 31. a. and note (6); 241. b. 4 Co. 122. *F. N. B.* 149. H.

(*y*) See *Perkins*, sec. 316. "Pur ceo que el fuit endowed de ceo par luy."

H

which

which she had *no* title (z). BROOKE, when speaking of this matter, says, (a), that the mother may re-enter on the death of the grandmother, because she was attendant on her. But this attendancy seems rather the consequence than the cause of the existence of the right of the mother in the third assigned to the grandmother.

[78] If the mother be endowed by the heir of the third of the whole premises, and the grandmother recover against the mother such third; and the mother recover against the heir the third of the two remaining parts, and the grandmother die; now the widow of the father must re-enter into the whole of the third so recovered by the grandmother; for if it be a third of such third, the third of such third is uncertain, and so she could not enter without assignment. I suppose, therefore, that her estate in the third of the two remaining thirds becomes, on her re-entry into the

(z) See *ante*, p. 68. note (h).

(a) *Dower*, 79. "Car l'ayles fuit attendaunt a luy."
third

third recovered by the grandmother, *ipso facto* void. And this seems to be what is meant by BROOKE, when he notes, that "the heir may then enter into the second dower; for the mother shall not have both (b)."

The reason then of this case may, perhaps, be as follows: Though the endowment of the grandmother defeated the seisin of the father, and so, in theoretic strictness, in like manner defeated also the dower of his wife, yet this strictness may, perhaps, especially in case of dower, which the law much favours, be deemed too refined, and so disregarded that the estate, being, on the first endowment of the mother, vested in her by the law, or the act of the heir, shall not be absolutely divested in point of interest; but the estate for the life of the grandmother being, in legal consideration, less than the estate for her own life, she shall be considered as

(b) *Dower*, 79. "L'heire peut entrer doncque en le seconde dower; car el (la feme le pere) navera ambideux."

[79] having yet a right, an interest, in contemplation of law : so that during the life of the grandmother, the grandmother shall be attendant on her, and not on the heir (as a proof of the continuance of her estate): and, having thus a subsisting interest, and the possession only being detained, she may be allowed, on the death of the grandmother (and in order to prevent the expence, &c. of a new endowment, her title being already proved or acknowledged) to re-enter into the third so recovered ; when her estate and interest in the third of the two remaining thirds shall become absolutely and *ipso facto* void; being only given her in consideration of her being deprived of her enjoyment or possession of such the third of the whole, and for her support during such deprivation: and thus the assertions of COKE, BROOKE, and PERKINS be reconciled: but if we maintain the strictness before specified, (which seems to me to be well-founded, and inevitably to follow from the principles before laid down, though perhaps

haps too nice for practice,) I do not perceive how the doctrine mentioned, of the mother's re-entry, can be supported as law. But, whatever be the true reason of such re-entry, such re-entry is, according to these authors, strictly legal: and the law is always ready to take advantage of the most trifling circumstance which can tend to the benefit of widows(c), whom it much favours (d). [80]

But to return: Thus, by THE ENDOW-
MENT OF THE WIDOW of a precedent possessor, when the heir takes the hereditaments *by descent*, will the seisin of such heir be defeated: CURTESY will not admit of any mesne seisin at all (e); otherwise, the consequences of it, as to this point,

Curtsey.

Admits of no
mesne seisin.

(c) See *ante*, sec. 1. p. 32. &c.

(d) See *Co. Litt.* 33. 37. 2 *P. Wms.* 703—4. *Banks v. Sutton.* *Jenk. Cent.* 9. *pl.* 15. 50. *pl.* 95. 72. *pl.* 35. *Cro. Jac.* 111. *pl.* 8. *Smith v. Smith.* 393. *pl.* 5. *Herbert v. Binion.*

(e) See 8 *Co.* 35. a. and b. *Paine's case.* *Co. Litt.* 29. b. 30. a. *Litt. s.* 394. and *Co. Litt.* 241. b. 2 *Inst.* 154. *Termes de la Ley*, ut: *Curtesie d'Engleterre.* *Gilb. Ten.* 173. 2 *Bla. Comm.* 127—8. ch. 8.

[81]

Dowress
cannot enter
without as-
signment.

would have been the same; it being equally an estate of freehold, and taking effect in reality, as dower does by relation, before any interest be vested in the heir (*f*). The law does not cast the possession of the estate in dower, (*i. e.* of dower AT COMMON LAW; for with respect to free-bench of COPYHOLDS it is otherwise (*g*)—), on the widow (*h*): nor can she enter without as-

(*f*) See *Co. Litt.* 29. b. 30. a. 241. b. 8 *Rep.* 36. a. 2 *Bl. Comm.* 127. ch. 8. See *F. N. B.* 194. D. *Termes de la Ley*, tit. *Curt. d' Englet.*

(*g*) See *Hob.* 181. *Howard & Bartlett.* and 6 *Viner's Abr.* 77. Copyh. (B. b.) *Bac. Abr.* 470. Copyh. (G.) and 5 *Burr.* 2787. *Vaughan d. Atkins v. Atkins.*

But it should seem that if the custom be that the widow shall have a *portion* only (as the half or third— See *Co. Litt.* 33. b. *Kitch.* 105.) and not the whole of a copyhold, as her dower or free-bench, the possession is not cast upon her any more than at common-law. And an assignment in such case would be equally necessary. See below, note (*i*), and *post*, 83, note (*o*). *Kitch.* 103. b. 3 *Leon.* 227. *Ca.* 303. 2 *Show.* 184. *Chapman v. Sharpe.*

So, of gavelkind-lands, of which the widow shall have a moiety, she must demand her dower of the heir, and shall have it assigned by metes and bounds. See *Robins. Gavelk.* b. 2. c. 2. p. 175. &c.

See 2 *Watk. on Copyh.* 89, 90. [99, 100. 2d edit.]

(*h*) See *Gilb. Ten.* 26,

signment

signment by the sheriff, or the agreement of the heir (*i*): so that, in this case, the heir *may* first enter and acquire seisin; but the law vests the estate by curtesy in the husband without any assignment, and even without entry, if the wife were already in

[82]

Otherwise as to curtesy.

(2) See *Litt.* s. 43. *Co. Litt.* 32. b. 34. b. 37. a. and b. *Brooke, Dower*, 16. *Scire Fac. pl.* 36. *Flowd.* 529. *Kitch. Courts*, 161—2. 2 *Bla. Com.* 135. ch. 8. See *Dyer*, 278. *pl.* 4. and *Perk.* s. 393.

But it should be observed, that when it is said that the widow cannot enter without assignment, it is meant of dower AT COMMON LAW, as contradistinguished, not only from dower BY CUSTOM, but also from dower AD OSTIUM ECCLESIE and EX ASSENSU PATRIS. For as dower at common-law is of A THIRD PART, it is not left to the widow to determine *what* is a third. But if the dower had been AD OSTIUM ECCLESIE or EX ASSENSU PATRIS, of lands expressly ascertained at the time, the dowress might by law have entered on the death of her husband, *without* any assignment. But such methods of endowment are now obsolete. See *Litt.* s. 39. 43. *Co. Litt.* 34. b. 37. a. and note (1). *Dyer*, 278. *pl.* 4.

But it should seem that, even in these cases, the freehold is not in the widow till *actual entry*. N. (1). to *Co. Litt.* 37. a. *Hale's MSS.* and see *Dyer*, 278. a. *pl.* 4. and *ante*, 66. N. (c).

H 4

possession,

Tenant by
the curtesy,

[83]

holds of the
lord:

possession (*k*), but not otherwise (*l*), immediately on issue had; (by which circumstance he becomes tenant *initiate*, though his estate is not consummate till the death of the wife (*m*)—). So that there being no chasm or intermission from the death of the wife to the possession of the husband, as there is, in case of dower, between the death of the husband and the possession of the widow, no mesne seisin can here take place. Beside, the tenant by the curtesy holds immediately of the lord, and is tenant to him (*n*); whereas the dowager

(*k*) *Bro. Præcipe quod reddat.* 88. *Dr. & Stud. Dial.* 2. c. 4. See 2 *Bla. Comm.* 127. ch. 8. 2 *Inst.* 154. And see also *ante*, sec. 2. p. 57. note (6).

(*l*) See *ante*, sec. 1. p. 38—9.

(*m*) See *Doct. & Stud.* b. 2. ch. 4. and 2 *Inst.* 154. *Co. Litt.* 30. a. and 40. a. and b. note (2). 2 *Bla. Comm.* 128. ch. 8. *Plowd.* 264. Note to English edit. and compare with *Co. Litt.* 32. 241. b. *Kitch.* 159. b. *Brooke, Ten. par le Curtesie*, 14. and see *Ibid. Villenage*, 67. and *Avowrie*, 27. 132.

(*n*) 2 *Inst.* 301. *F. N. B.* 258. A. See 2 *Comm.* 126. ch. 8. 8 *Co.* 36. a. Paine's case.

holds

holds of the heir (o), and is attendant on such heir for the third of the services (p). And widow of the heir.

But, though the seisin of the heir *may* [84]
be defeated, as we have observed, yet, where seisin of an inheritance is once alleged, it shall always be intended to continue till the contrary be shewn (q). Continuance of seisin.

(o) *F. N. B.* 8. *F. G.* 258. *B.* 265. *A. Co. Litt.* 31. b. 241. a. and note (1). 2 *Bla. Comm.* 135—6. ch. 8. 8 *Rep.* 36. a. Paine's case. *Brooke, Tenures*, 84. *Kitch.* 209. b.

The widow shall hold as the heir holds, and not as the baron held. *Kielway*, 124. a. *pl.* 80. and 129. a. *pl.* 98.

If a woman be endowed of a manor, she shall pay all services to the heir as he pays over. *Plowd. Qu.* 90.

(p) See note (o), and *Perk.* s. 424. *F. N. B.* 8. *F.* 7 *Co.* 9. a. 8 *Co.* 36. a. 9 *Co.* 135. a. and b. *Termes de la Ley*, tit. *Attendant*.

If there be no heir, and the lord or donor enter for such default, the widow shall hold by the third part of the services of such lord or donor: but if the lord or donor determine the estate of the husband by his own act, as by purchase, she shall not render any services to him. See *Brooke, Tenure*, *pl.* 33. 82. and *Extinguishment*, 31. *Fitz. Abr. Dower*, *pl.* 130. *Perkins*, s. 429. *Kitch.* 209. b. and see *The Customes of Westsheen*, &c. art. iv. in 2 *Collect. Jurid.* 382.

(q) *Sir Thomas Jones*, 182. case of *Cockman v. Farrer*. And see *Plowd.* 193. a. 431. a.

Seisin is also favoured in equity. See *Gr. and Rudim. of Law and Equity*, 66. rule 96.

SECT. IV.

Of what Hereditaments a Possessio Fratrismay be.

A POSSESSIO FRATRIS may, generally speaking, be of all HEREDITAMENTS, corporeal or incorporeal; as lands, rents, &c. (a). So of GAVELKIND-LANDS (b); of lands in BOROUGH ENGLISH (c); and

* It is frequently said in these pages that a *possessio fratris* may be of an use, trust, &c. of which, strictly speaking, there can be no seisin or possession; and consequently it seems a contradiction: yet it is so said, not only in compliance with the usual mode of expression, but for want of a better term, and to prevent a prolixity. All that is meant is, that the property is so fixed in a mesne person as to make *him* the stock of descent.

(a) See *Co. Litt.* 14. b. *F. N. B.* 36. E. And *ante*, s. 1. and 2.

(b) See *Robins. on Gavelk.* b. 1. ch. 6. p. 100.

(c) 1 *Com. Dig.* 615. Borough English.

of

of COPYHOLDS (*d*). Of AN USE (*e*): (*i. e.* [85]
of uses *not* executed by the statute; for
uses executed are legal estates(*f*)—). Of
A TRUST (*g*). Of AN EQUITY OF RE-
DEMPTION, (as seemingly by the better
opinion (*h*)—). And although a POSSES-
SIO FRATRIS CANNOT properly be of A
REMAINDER OR REVERSION EXPECTANT

(*d*) *Gilb. Ten.* 161. 4 *Co.* 21, 22. *Lex. Cust.*
ch. 17. p. 153. 157. *Kitch.* 81. b. 2 *Brownl.* 43.
Reyner v. Poell. *Coke's Copyh.* s. 50. *Tracts*, 116.
And see *ante*, s. 2. p. 51—2.

(*e*) See *Fitzh. Abr. tit. Subpœna*, pl. 3. 1 *Co.* 88. a.
and 121. b. 4 *Co.* 22. *Brooke*, tit. *Descent*, 36.
Dyer. 10—11. pl. 40. 274. pl. 43. *Plowd.* 58. *Co.*
Litt. 14. b. 19. b. 2 *P. Wms.* 736. But see 2
Anders. 146—7. *contra*. Note: See *Sanders on Uses*
and Trusts, 104—5.

(*f*) *Co. Litt.* 14. b. note (5), and see 2 *Atk.* 583.
and 1 *Ibid.* 593.

(*g*) See 1 *Co.* 121. b. 2 *P. Wms.* 713. *Hardres*,
488—91. in 2 *Comyns's Dig.* Chancery, (4. W. 1.)
Moseley, 72. *Penville v. Luscomb*.

(*h*) See 1 *Atkins*, 604. 607. *Casborne v. Scarf*
& *al.* and *Co. Litt.* 205. a. note (1). and
Moseley. 72. *Penville v. Luscomb.* and *ante*, 60.
N. (*a*).

UPON

[86] UPON AN ESTATE OF FREEHOLD (i), yet by the exertion of certain acts of ownership, (as by granting them over for term of life,) a POSSESSIO FRATRIS of them may be made (k). There can be NO POSSESSIO FRATRIS of an ESTATE TAIL (l); nor of HONORARY DIGNITIES (m); but of A FEUDAL TITLE OF HONOR there MAY; for the title follows the land (n). So of AN OFFICE OF DIGNITY (o.) But of the descent of THE CROWN AND ITS POSSESSIONS there can be NO POSSESSIO

(i) *Gilb. Ten.* 15. See *Co. Litt.* 14. a. and note (6). 11. b. *Kitch. Courts*, 109. b. &c. 3 *Co.* 42. a. and b. *Cro. Car.* 411—12. *Reeve & Malster.* 8 *Co.* 88. b. *Buckmere's case.* And *post.* ch. 3. s. 1.

(k) 8 *Rep.* 35. b. *Co. Litt.* 15. a. 191. b. and *post.* ch. 3. s. 1.

(l) *Fitz. Abr.* tit. *Discent*, 8. *Plowd.* 57. 3 *Co.* 42. a. *Co. Litt.* 14. b. 15. b. *Noy's Max.* 23. ch. 4. *Brooke, Discent*, 56. *Kitch.* 109. b. See *Calth. Copyh.* 88.

(m) 3 *Co.* 42. a. *Co. Litt.* 15. b. And see *Shower's Parl. Cases*, 9, 10. *Visc. Purbeck's case.*

(n) *Co. Litt.* 15. b. note (3). *Ante*, sec. 2. p. 61.

(o) *Co. Litt.* 15. b. note (3).

FRATRIS.

FRATRIS (*p.*) Neither can there be a **POSSESSIO FRATRIS** of a **RIGHT ONLY** (*q*); nor of an **INCIDENT OR APPENDANCY**, distinctly from its principal (*r*).

(*p*) *Plowd.* 245. *Co. Litt.* 15. b. 2 *Blackst. Comm.* 233. ch. 14.

(*q*) See *ante*, sec. 3. p. 64.

(*r*) See *ante*, sec. 2. p. 62.

[87]

CHAP. II.

THE RULES OR CANONS OF DESCENT.

WHEN the property is vested or fixed in a person so as to be transmissible to the heirs of such person, whether he himself took by descent and acquired an actual seisin of the hereditaments descending, or whether he took as first purchaser, such hereditaments shall descend to the right heirs of the person so actually seised of an estate of inheritance in possession, or in whom they are so fixed by purchase; or, if they are in reversion or remainder expectant upon an estate of freehold, to the right heirs of the person creating the particular estate, on which such reversion is expectant; or of the person to whom such remainder is limited; or of him who, being an intermediate person, has acquired
a seisin

a seisin (if we may call it such) of such reversion or remainder by the exertion of any act of ownership, which is tantamount or equivalent to an actual seisin of hereditaments in possession, according to the following [88]

CANONS :

1. Hereditaments shall lineally descend to the issue of such person *in infinitum* ; but shall never lineally ascend (a).

2. The

(a) As if a son purchase land, and die without issue, and his father or mother be then living ; his father or mother shall *not* (as such) inherit such lands immediately from the son. But if the father or mother be also COUSIN to the son, they *may* (as such) succeed to the inheritance. See 2 *P. Wms.* 614. *Eastwood v. Vinke*, or *Styles*. And see *Prest. Tr.* Tr. vi. p. 78.

And if there be father and two sons, and one purchase lands and die ; the BROTHER shall take the inheritance as heir to him, although the father be living. For though the father seems the source of the inheritable blood, yet, as the son held the descending feud *ut antiquum*, it is supposed to have already passed him (the father) ; and, therefore, the descent between brother and brother is considered as *immediate* ; and in making out

2. The male issue shall be admitted before the female.

[89] 3. Where there are two or more males in equal degree, the eldest only shall inherit, but the females all together.

4. The lineal descendants, *in infinitum*, of any person deceased shall represent their ancestor: that is, shall stand in the same place as the person himself would have done had he been living (*b*).

5. On

out their title to each other, the common father need not be named: but the descent between them shall be, if he be living, exactly the same as though he were deceased. See 1 *Vent.* 423. 2 *Blackst. Comm.* 212. and 226. ch. 14. *Hale's Com. Law.* 258, and 270. ch. 11. *Litt.* s. 2 and 3. *Co. Litt.* 10. a. and b. 11. a. *Wright's Ten.* 180—6. ch. 3. *Gilb. Ten.* 14.; and see *Godb.* 275. ca. 388.

(*b*) This right of representation takes place also in descents of GAVELKIND and BOROUGH ENGLISH LAND; as also of COPYHOLDS in the nature of those tenures. See 1 *Mod.* 102. *Blackburne & Graves*, 2 *Lord Raym.* 1024. *Clements v. Scudamore*, and *Robins. on Gavelk.* b. 1. ch. 6. p. 91—98. and *Appendix*, p. 11. to the end. *Kitch.* 86. a. and see 1 *Roll, Abr.*

5. On failure of lineal descendants, or issue, of such person, the inheritance shall descend to his collateral relations, being of the blood of the first purchaser; subject to the three preceding rules (c).

6. The

Abr. 623. *Disc.* (A.) *pl.* 3. The custom of Borough-English holds in the *lineal* descent: and the distinction seems to be, that it holds in the *lineal*, but not in the *collateral* lines. See 1 *Roll. Abr.* 624. *Disc.* (B.) *pl.* 2.

But where the custom of a manor was expressly stated to be, that the copyhold lands of every tenant *dying seised* should descend to the youngest son, it was adjudged that it would not extend to the case of a *surrenderee dying before admittance*; for he was not a *tenant*; nor could he have *died seised*. See Hale's case, cited by *Holt*, C. J. 1 *P. Wms.* 65. in the case of *Clements v. Scudamore*. and see *Robins. Gavelk.* 98.

(c) The custom of gavelkind extends to collaterals; so that if one brother die without issue, all the other brothers shall succeed. See *Rob. Gav.* b. 1. c. 6. p. 92—3.

But the custom of Borough-English does *not* extend to collaterals; and, therefore, lands of that tenure shall not go to the youngest *brother* without a special custom. See *Ibid.* 93. *Comyns's Dig.* Boro' Engl. 14 *Vin. Heir.* (F. 5.) 1 *Durnf. & East.* 466. Denn *d. Goodwin v. Spray*, and *supr.* note (b).

6. The collateral heir of such person must be his next collateral kinsman of the whole-blood.

[90] 7. In collateral inheritances, the male stock shall be preferred to the female; (*i. e.* kindred derived from the blood of the male ancestors, however remote, shall be admitted before those from the blood of the female, however near;) unless where the lands have, in fact, descended from a female.

These canons are already so ably deduced and so fully illustrated, particularly by Mr. J. BLACKSTONE and LORD HALE, that it would be equally presumptuous as needless for me to attempt saying any

So if a custom be specially found that the lands of a tenant shall descend to, and be partible between, *all his sons*, it should seem that it would not extend to *all his brothers* if he die without issue: for the custom is not that lands shall descend "*after the manner of gavelkind*," but merely that they shall descend to the *sons*. See above, Hale's case. and *Rob. Gav.* 38. &c. *Wright's Ten.* 212. N. (n).

thing

thing further on the subject. I shall therefore content myself with thus inserting these canons, for preserving the concatenation of the work; and shall refer to *Hale's Hist. of the Common-Law*, ch. 11. and *Blackstone on Descents*; and his *Comment.* vol. ii. ch. 14. *Robinson on the Law of Inheritances in Fee-Simple* may also be here consulted, with *Dalrymple, F. P.* ch. 5. p. 188. *Sullivan*, lect. xiv. p. 135. and *Wright's Ten. passim.* and *Essays on Brit. Antiq. Ess.* iv.

[91]

CHAP. III.

OF THE DESCENT OF REVERSIONS AND
REMAINDERS EXPECTANT UPON ES-
TATES OF FREEHOLD.

SECT. I.

Of a mesne Seisin, &c. of such Estates.

BUT before I speak immediately to this point, I will make a few historical remarks prefatory to the subject;—they may elucidate the doctrines which will be presently deduced. And without wearying myself or wearying my readers, with looking into the pages of antiquity, I shall just give a deduction of facts, as they occur to my memory, and refer to a few writers, and those chiefly of a recent date; not for the purpose of establishing such facts, (for then perhaps more proper authorities might

might be vouched,) as I think the reader's own recollection will confirm and bear testimony to what he finds; but because he may, in the books referred to, meet with observations more illustrative of the subject, and more worthy of his attention and trouble.

[92]

At an early age, at the dawn of the feudal system, the ultimate property, or *dominium directum* of the lands, seems to have been in the nation or society at large. Indeed it must have required a length of time to have arrived at this state of refinement; yet it certainly is no more than what we find many states which we deem barbarous, and even savage, have attained to (a). However, at the age I speak of, and in several countries of Europe, the abstract idea of society, or the

The *dominium directum* originally in the state.

(a) See *Sullivan*, Lect. iv. p. 36. *Stuart's Diss. Ant. Eng. Const.* pt. 1. s. 3. and *View of Soc. in Eur.* 24. 151. 201. 213. 4to edit. *De Lolme on the Const. of Eng.* b. i. c. i. p. 10—11. edit. 1789. See *Linschoten*, b. 2. p. 219. 221. *Lamb. Observ. As. Af. and Am.* vol. i. ch. 20. p. 205. *Ferguson on Civ. Soc.* part 2. s. 2. p. 124. and *Aristotle*, Pol.

[93]

public, prevailed, and the absolute property of the soil was supposed to belong to such society at large. Among the ancient Germans we find the custom of dividing the lands annually among the freemen, while the ultimate property therein seems to have been lodged in the tribe. As society, therefore, was an abstract idea, it was requisite to have a corporeal representative, in whom certain properties attributed to such society should be vested. Hence arose the chief political person of the state.

Several small
clans form a
nation.

In those early times a state consisted of a number of petty clans or hordes, the individuals of each of which were more immediately subject to a particular chief, who led them to war, and who presided over them in peace, in a civil capacity, as their magistrate. But when a cause arose between the chieftains, or any of the individuals of the several clans, they must have had recourse (when the contention was not decided by the sword) to an higher tribunal,

tribunal, which had authority over each. As several of these petty districts formed a state, each was subject to the general control: but as every freeman was thus amenable to the acts of such society, every freeman had a seat in the supreme assembly. These assemblies met at certain stated times, or upon some pressing emergency, and framed rules, &c. for the direction of the state. Thus was the supreme authority vested in the aggregate of freemen; and thus was it to continue.

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But it was necessary, on many occasions, to delegate a portion of such power to particular individuals: and therefore, we find that over these rude states a monarch or king was generally elected to preside, though with very limited authority. And when a war was determined on, or an invasion impended, as a leader or chief was requisite to conduct the united clans, such king led them to battle: or, in case the cause was not a general one, and only a particular clan, or a few of such districts

And elect a general monarch or chief.

were concerned in the enterprize, or the monarch declined leading them himself, or in case several states united in a general war, they elected a chief for the purpose of conducting them: but, as that purpose was frequently the only one for which he was elected, when the war determined, his authority ceased, and he descended to his pristine station (b).

Pro tempore.

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Civil magistrates.

Again, as to the civil government, a certain portion of authority was delegated

(b) See *Versteg, Rest. Dec. Intel.* c. 3. p. 68. See it also in *Speede's Chron.* b. 7. c. 3. s. 10. p. 290. and in 1 *Tyrr. Gen. Hist. Eng.* Intro. xxxix. See *Nor. Ant.* vol. i. c. 4. p. 61. c. 8. p. 158. 168. *Bick. Alf.* 1. 11. 41. 1 *Tyrr. Hist. Eng.* b. 2. p. 33. b. 3. p. 116. b. 5. p. 254. *Camd. Brit. Introd.* (Engl. Saxons.) *Mod. Univers. Hist.* vol. xlii. p. 2. See *Hottom. F. G.* ch. 1. 6. 10. *Verst.* c. 10. p. 349. *Speede*, b. 5. c. 6. p. 173. b. 7. c. 1. p. 282. See *Loc. on Gov.* b. 2. s. 102. 106. 108. &c. *Adair's Am. Ind.* 428. 435. And *Leo's Afric. Falc. on Climate*, &c. b. 4. c. 2. p. 228. *Sullivan*, lect. iv. p. 30. And *Ferguson on Civil Soc.* part 2. s. 3. p. 152. 1 *War. Wales*, b. 1. p. 4. 42. b. 2. p. 119. b. 3. p. 132. 136. b. 4. p. 246. *Stuart's Diss. Eng. Const.* part 3. s. 2. p. 132. *Roberts. America*, vol. ii. b. 4.

to magistrates, who, deriving their power from the society at large, were not confined to a particular clan or family, but enabled to decide those causes which arose between the individuals of separate districts, or between the lord or chief and the particular persons who were immediately subject to him, in order to secure to the individual that impartial administration of justice which society was instituted to confer. These magistrates, thus chosen, were generally such men whom experience had taught wisdom, and whose understanding was ripened by age. Hence the titles of them, in most ancient nations, were those of the elders, aldermen, senators, fathers, ancients (c), &c. which were expressive of this qualification. The number of these magistrates was different in different states: But we may remark, that they continued elective by the people long after the chieftainry became heredi-

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(c) So the title of *Sheikh*, among the Arabs, signifies an old man. See *Journal from Aleppo to Damascus*, p. 6. note (f).

tary ;

tary; and many continue so among us to this day.

General
assembly.

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Thus were the chiefs and the civil magistrates elected by the society, while the freemen, constituting the nation, reserved the supreme power to themselves. When a war threatened, when magistrates were to be chosen, or when the lands were to be apportioned out to the individuals entitled, the subject was debated and determined on in the general council or assembly. The council or assembly appointed the portion of ground to the subject; they chose their magistrates; and, when unity of action was more immediately requisite, when the assembled army was to be conducted, they nominated an individual to preside and to direct the belligerent clans. This, or something very similar to this, seems to have been the manner of government among our German ancestors (*d*), from very early times, and to have continued among them till their leaving their

(*d*) See *Tacitus, Of the Manners of the Germans.*
natal

natal dwellings, with very small alteration.

The government of the Saxons, while on the continent, is thus described: "They Saxon government.

" ordained twelve noblemen, chosen from
 " among others, for their worthiness and
 " sufficiency. These, in the times of
 " peace, rode their several circuits, to see
 " justice and good customs observed; and
 " they often, of course, at appointed
 " times, met all together, to consult and
 " give order in public affairs. But ever
 " in time of war, one of these twelve was
 " chosen to be king, and so to remain so
 " long only as the war lasted; and that
 " being ended, his name and dignity of
 " king also ceased, and he became as be-
 " fore. And this custom continued among
 " them till the time of their wars with the
 " emperor Charles the Great;" when "the
 " mutable title of king" became heredi-
 " tary (e).

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(e) See *Verstegan's Restit. of Dec. Intell.* ch. 3. p. 68—9. and 1 *Rapin. Hist. Engl.* 76. 8vo. edit. and v. 2. p. 140.

As

Armies elect-
ing chiefs or
kings.

As every freeman that was not incapacitated by sickness, age, or other corporal or mental disability, was a *soldier*, and their armies thus consisted of their whole people, we often find their armies electing their kings. Indeed, as their general assemblies were composed of the same persons, (for the most part at least,) and each attended in his armour, they may be considered in the same light. Hence their custom, upon the election of a king, of placing him upon A SHIELD, and carrying him around the army; and amid the general shouts and acclamations of the people, proclaiming him their leader or king (*f*). When, indeed, they had chosen out their individual, we sometimes find them setting him up upon A GREAT STONE in the view of the people, and thus hailing

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(*f*) See *Hottom. F. G.* ch. 4. and 6.; and see *Volt. Spir. of Nat.* vol. i. ch. 13. p. 124. (8vo. edit.) *Stuart's View*, 283. *Diss.* part 3. s. 2. p. 152. note (27). and see 1 *North. Ant.* c. 8. p. 170. *St. Remy. Mem. liv.* i. an. 418. p. 32. *liv.* ii. an. 510. p. 154. tom. 1.

him

him their king (*g*). We have yet the reliques of these customs: we *chair* our representatives in parliament, &c. And the stone which Edward the first brought with him out of Scotland, and to which the Scots paid the highest veneration, and is now placed in our coronation chair, seems a vestige also of the latter usage; it having been appropriated for that purpose; their kings being seated on it, from very remote times, when they received their inauguration (*h*).—But to return.

When these northern warriors rushed forth to conquest, and poured out their forces over the branches of the empire;

“ When Rome, with heaviest sound, a giant statue
“ fell (*i*),”

they necessarily had their particular leaders [100]

(*g*) See *North. Ant.* vol. i. ch. 8. p. 168. vol. ii. p. 45. N. (*c*). *Camb. Brit.* Customs of the Irish. And the references in next note (*h*).

(*h*) See 3 *Tyrr. Hist. Eng.* b. 9. p. 96. anno 1296. *Supplem. to Mod. Univ. Hist.* vol. xli. c. 1, p. 16. and 85. vol. xxxix. p. 204. *Camb. Brit.* tit. *Scone*.

(*i*) See *Collins' Ode to Liberty*.

or

The Kingly office * becomes for life.

* "Yt ys an office," says Sir J. Fortescue, *On Mon.* c. 8. p. 55. and *Vide*, 1 *Marix.* st. 3. c. 1. s. 3.

or captains. And when they had settled in the countries they thus acquired, surrounded by enemies yet unsubdued, and intermixed with the native inhabitants, who were generally formidable enough to preserve their fears, and often to endanger their safety, a permanent captain, general, or king, over the particular clans which settled, was requisite. In the Saxon period, there were seven several states or kingdoms established in this island, which had their respective perpetual chieftains or kings: but as these seven states formed also one general society, a general monarch was also chosen (*k*).

The king represents the nation as to the military power.

When the chief representative of the state, or of the particular kingdom, became permanent, and when the military capacity and returns were, from the con-

(*k*) See *Camb. Brit.* Introd. p. cxxx—i. *Speed.* b. 7. c. 4. p. 293. 1 *Tyrr.* b. 5. p. 254. *Bick. Alf.* 41. *Mill. View Eng. Gov.* b. 1. c. 3. p. 52. *Bac. on Gov.* b. 1. c. 16. *Squire*, s. 28. and N. (1). s. 29. and N. (1). s. 66. N. (2). s. 75. and N. (1). 1 *Rap. Eng. Hist.* 149. 8vo. edit. and vol. 2. p. 140. &c.

tinual

tinual wars which in those times prevailed, ultimately concentrated in him as their chief, it was an easy transition to suppose that the individual held his lands of him to whom he owed his services; and, more especially, as the idea of hereditary succession was then partly received, and, consequently, the chief seemed more self-subsistent than when elected for a transient cause (*l*). As he thus represented society as to the military power, it was imagined that he represented it also as to the property of the lands. Hence was it said, that the ultimate property was vested in him, and that the subject held his feud of the king. Not, indeed, that the king then, or ever since, could be supposed, individually, the ultimate proprietor of the soil any further than as the representative of the society at large: this is evident, were it needful to urge any proof other than

And as to the
property in
lands.

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(*l*) See *Stuart's Diss. on the English Con.* pt. 2. s. 1. p. 77. and note; and pt. 3. s. 2. p. 132. The author had not read this valuable work when he wrote the text of the present pages; though he has since made frequent references to it in the notes.

that

The king's
demesnes.

that it carries in itself, from the demesne lands of the king: these, in the times of the Saxons, were considered as the lands of the nation, and unalienable by him without its express consent (*m*).

Among

(*m*) When the king had a power of granting feuds, the demesnes were necessarily alienable, as they were the fund which supplied those grants; but yet, when the demesnes were reduced so far as to be scarcely sufficient for his support, the nation interfered, and prevented any further reduction. See *Mill. View*, &c. b. 1. c. 7. p. 148. and 157. *Stuart's View of Soc. in Eur.* b. 1. c. 2. s. 1. p. 26—8. 1 *Tyrr.* Introd. p. lxviii. and p. 257. *Sub. An.* 836. And see 2 *Spir. of Laws*, b. 31. c. 7. p. 430. *F. N. B.* 14. D. and *Stuart's Diss.* part 3. s. 2. p. 144.

These demesne lands formed the chief part of the revenue of our ancient kings. William the First had, it is said, 1422 manors, beside other lands. His annual revenue, nearly four (some say nine or ten) millions of our present money. Henry VI. had nearly one-fifth of the kingdom in value. See *Sulliv.* 172. *Mod. Univ. Hist.* vol. xxxix. p. 61. *Fortesq. on Mon.* ch. 11. p. 82.; and see *Essay on the Polity of Eng.* 890. p. 459. note (*z*). *West on Peers*, 24.

De Lolme conceives that it is in consequence of the king's being considered as THE UNIVERSAL PROPRIETOR OF THE KINGDOM that he is deemed directly concerned in *all offences*; and that *for that reason*,

Among the ancient Germans, we have [102]
 seen that the lands were portioned out to the Feuds distributed annually.

PROSECUTIONS ARE TO BE CARRIED ON IN HIS NAME IN COURTS OF LAW. *Const. of Eng.* b. 1. c. 5. p. 72. (edit. 1789.)

But, with great respect to *M. De Lolme*, I must beg leave to say, that the circumstance of prosecutions for criminal offences being carried on *in the name of the king* does not appear to be the consequence of his being "looked upon as the universal proprietor of the kingdom." For "the fiction" of his being so considered is founded upon *feudal principles relative to the idea of PROPERTY, and not to that of CRIMES*: for what has the universal proprietorship of *this* kingdom (for we are not speaking of *Japan*. See *Spir. of Laws*, b. 6. c. 13. p. 124. 8vo. ed.) to do with the punishment of criminal offences? But that it is in consequence of his being *the representative of society* AS TO THE EXECUTION OF ITS LAWS, or HIM IN WHOM THE EXECUTIVE POWER IS LODGED, that such prosecutions are carried on in his name. All offences of such a nature are injurious to society; society therefore must punish them: but as society is a mere *ens rationis*, an abstract idea, it must be *represented* in order to punish: And, as to the EXECUTIVE POWER of society, THE KING is, in this nation, the representative of it; and, therefore, all prosecutions for crimes are carried on in his name.

This idea seems necessary to society, and to have been well understood in most, if not all states; even in those which are rude—as among the natives of

K

Africa,

[103] the individual every year; when they returned again to the state. To have given them

Africa, Asia, and America: we find it among the ancient British, Irish, Germans, &c. &c. See *Leo's Afric.* b. 3. p. 162. fol. *Adair's Amer. Ind.* 145. *Lamb. Obs. As. Af. and Am.* vol. i. ch. 11. p. 117, 118. *Spir. of Laws*, b. 6. c. 5. and c. 13. See *Lord Kaims's Tracts*, tr. 1. p. 40. *Stuart's View of Soc. in Eur.* b. 1. c. 2. s. 3. p. 27. and 254. 39, and 256. *Falc. Clim.* b. 1. c. 18. s. 4. and N. *Nor. Antiq.* vol. i. c. 8. p. 187. *Whit. Manch.* vol. i. c. 8. p. 378. *Bacon on Eng. Gov.* part 1. c. 40. fol. 1 *Tyrr. Hist. of Eng. Introd.* p. 126. *Camb. Brit.* p. 1043—4. note. See *Eunomus*, vol. iii. p. 289. and vol. iv. p. 193. *Law of Forf.* 102. 111. and note. And see *Beccaria on Crimes*, and *Eden's Princ. of Penal Laws*.

Solon, to the question, "Which is the most perfect popular government?" answered, "That, where an injury done to any private citizen is such to the whole body." The whole body therefore should punish; but it should punish by THE REPRESENTATIVE OF ITS PUNITORY POWER.

Among our Saxon ancestors, a *fine* was imposed on all criminal offences, even down to that of *ederbrece*, or, as we now term it, "breaking the close or fence;" (*quare clausum fregit*; see 3 *Bla. Comm.* c. 12. p. 209—210.) The fine for which was, by a law of Alfred, fixed at five shillings.

And with us, at this day, all offences denominated *crimes* are considered as offences against the public or society,

them for a *longer* time would have been dangerous to their military avocations; would

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society, and prosecuted by *the crown*: and for all such crimes, down to the lowest trespass *vi et armis* to the individual, a *fine* or forfeiture is, in strictness, due. See 1 *Blackst. Comm.* c. 7. p. 268. 3 *Ibid.* c. 8. p. 118. 138. 2 *Hawk. Pleas of the Crown.* c. 2. s. 3. *Sir Tho. Smith's Com. Wealth of Eng.* b. 2. c. 10. and 14. 3 *Co.* 12. a. *Burton's Excheq.* vol. i. p. 407. and vol. ii. p. 277. 8 *Rep.* 59. b. 60. a.

So whatever affects THE PUBLIC; as nuisances, restraints of trade, &c. Thus a dyer was bound that he should not use "his craft" for two years; and HULL held, that the bond was against the common-law:—"And, by G—d, (said the old Judge,) if the "plaintiff were here, he should go to prison *till* he "had paid a fine to the king." See 11 *Rep.* 53. b. *Year-book, Pasch.* 2 *Hen.* 5. f. 5. b. *pl.* 26. *Fitzh. Abr. Impr.* *pl.* 14.

All crimes or offences of a *public* nature are therefore *indictable* at the suit of the king, as the king is the representative of the public as to the execution of the laws; and an *indictment* is said to be HIS SUIT: but for whatever is of a *private* nature, the offender is only punishable *at the suit of the person injured*. See 2 *Hawk. P. C.* c. 25. s. 3, 4. 4 *Comm.* c. 15. p. 218.; and 3 *Com. Dig.* 504—6. Indictment, (D.) and (E.) Information, (B.) p. 520.; and see 4 *Bla. Comm.* c. 1. p. 2. 2 *Strange*, 788—92. *Rex v. Curl.* 3 *Burr.* 1698. *Rex v. Storr.* *Ibid.* 1706. *Rex v. Atkins.* *Ibid.* 1731. *Rex v. Bake & al.*

[105]
Agriculture
and the arts.

would have diverted their thoughts and care too much to agriculture and the arts.

Though THE KING is, in this nation, considered as its chief magistrate; (see 2 *Hawk. P. C.* ch. 1. s. 1.) yet he has delegated his JUDICIAL POWER wholly to his Judges (unless it be when he is considered as presiding in his supreme court of parliament, (See 12 Co. 63. *Case of Prohibitions del Roy.*) or upon appeals). To suppose him to be at once the prosecutor and judge would be absurd: (See 1 *Spir. Laws*, b. 6. c. 5.; and 2 *Hawk. P. C.* ch. 1. s. 2.) And was he to be a Judge in any other suit, it would preclude an appeal: for to whom can we appeal from supremacy itself? "But (says the celebrated FATHER PAUL) appeals are necessary; as it would be tyranny to subject any one to the opinion of a single judge, who might thereby oppress him at will. Sovereign princes, therefore, (he adds,) do not pass sentence themselves, that the persons condemned may have the benefit of appeals." (See *his Rights of Sovereigns*, c. 3. p. 45—51.)

And although the court of KING'S BENCH be considered as *peculiarly* the KING'S court, he being supposed to sit there in person, as he once actually did: (See 2 *Burr.* 851—2. *Sulliv.* 300. lect. 32. *Dalrymple*, 275. See *Squire*, p. 182. N. (1). 1 *Rob. Cha.* V. s. 1. p. 370. (2). In Scotland the king sat in person so lately as the reign of James VI. *Dalrymple*, F. P. 284. (See *Kaims's Tracts*, 299, 300.) and the style of the court still being *coram ipso rege*: (See 3 *Bla. Comm.* c. 4. p. 41.) yet the judges of "the court" give the judgment, and not the king. And therefore
a writ

arts (*n*). But yet agriculture was necessary; and therefore they were *annually* assigned (*o*.) To give them for a *less* time would not have afforded them an opportunity to have gathered the fruits of their labours—to have reaped what they had sown. But when they had acquired lands in the states they had conquered;

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a writ of error lies from this court into that of parliament: yet this does not involve in it the absurdity of an appeal to a superior power than that of the king himself; for still it is *to HIM in parliament*: and not under an idea that the house of lords is, in such judicial capacity, superior to the monarch, who is himself the fountain of justice. (See 12 *Rep.* 64—5.)

(*n*) *Vide Cas. de Bello Gall. lib. vi. c. 20.* See *Lowman on the Civil Gov. of the Hebrews*, c. 4. p. 56. 2 *Bla. Comm.* 55. c. 4. and *Stuart's Diss.* part 1. sec. 3. *Falc. Clim.* b. 6. c. 1. s. 1. p. 272. and N.*. *Squire*, s. 14, 15, 16. *Davys*, 3. 4. a. 49. b.

(*o*) Among the *ancient Irish* the division of lands was usually made on the death of each tenant. See *Davys's Rep.* 49. &c. *Stuart's Diss.* part 1. s. 3. p. 35. N. (12). and *View of Soc. in Eur.* b. 1. c. 1. s. 1. p. 152. N. (1).

So that they were continually changing their situation. See *Davys*, 34. a. 49. &c. *Stuart's Diss.* 32. N. (8). *View*, 24. 251.

In *Peru* the lands were allotted annually. 2 *Rob. Amer.* b. 7. p. 312. (4to. ed.)

K 3

when

Gilb. Ten. 13. the FEUDAL POSSESSION; and if he had granted his estate for years or at will, yet *his* possession was still considered as existing; and the enjoyment of the lessee was that of the lessor: the lessee being considered in no other light than as the bailiff or servant of the freeholder, and accountable to him for the profits of the lands at a certain and stated sum (*q.*) And hence also is it, that

[109] no other is said to be SEISED of property in lands but he who has a FREEHOLD estate. He who is A LESSEE is only said to be POSSESSED; and that not properly of the *land*, but of *the term of years* (*r.*) He, therefore, who has A FREEHOLD is said to be SEISED, and to have THE FEUDAL POSSESSION; and, *e converso*, he who has the SEISIN, OR FEUDAL POSSESSION, has the FREEHOLD; for such is the definition of A FREEHOLD ESTATE (*s.*)

(*q.*) See *Mill. View of Eng. Gov.* b. 1. c. 5. p. 86. *Gilb. Ten.* 30—49. *Co. Litt.* 239. b. note (2); and 331. a. N. (1). 2 *Blackst. Comm.* 141. ch. 9. *Gilb. Hist. Feud. MS.* p. 49—50.

(*r.*) See 2 *Bla. Comm.* 144. c. 9.

(*s.*) See *Ibid.* 104. c. 7. and the authors there quoted and referred to; and *Co. Litt.* 230. b. note (1).

And

And hence arises the distinction in our law between a FREEHOLD and a CHATTEL INTEREST: As the possession of the lessee is that of the lessor, THE FEUDAL SEISIN remains IN THE TENANT OF THE FREEHOLD; and if he has a descendible estate, it will devolve on his death to HIS OWN heirs, as of the person LAST SEISED: but if the *descendible* estate be EXPECTANT UPON A PRECEDENT FREEHOLD, the FEUDAL SEISIN is in such PRECEDENT TENANT; and, consequently,

Freehold and chattel interest.

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There can be NO MESNE SEISIN of a REMAINDER OR REVERSION *expectant upon an estate of* FREEHOLD, so as to make a POSSESSIO FRATRIS (*t*), while such remainder or reversion continues in a regular course of DESCENT (*u*).

Reversion on a freehold, Not subject to *possessio fratris*.

(*t*) See *ante*, c. 1. s. 4. p. 85.

Nor shall the *descent* of such remainder or reversion take away an entry, or put him who has right to his action. *Co. Litt.* 239. b. 243. a. 244. a. *Noy's Max.* 35. ch. 16. *Finche's L.* b. 2. c. 3. p. 120. 1 *Co.* 134. b. 8 *Co.* 101. b. *Gilb. Ten.* 22.

(*u*) For if it be granted over, it vests immediately in the grantee; and makes *him* the stock of descent: and, in such case, the person afterwards claiming by descent, must make himself heir to *such purchaser*. See *Hale's Comm. Law*, 269. ch. 11.

But

But as such remainder or reversion may be sold, devised, or charged, by the person entitled to it (x), the descent of it may be changed by the exertion of certain acts of ownership; as by granting it over for term of life, or in tail (y).

For, the exertion of such acts of ownership is equivalent to the actual seisin of an estate which is capable of being reduced into possession by entry. For, as an actual entry is not practicable in the case of such reversion or remainder, the alienation of them for a certain estate is sufficient to turn the descent: such grants being (before the statutes 4 & 5 Anne, c. 16.) always attended with attornment, the notoriety of them and the consequent alteration of the tenant, were deemed equal to the actual entry on a descent, or

(x) *Brooke*, Disc. 30. *Estates*, 24. 40. *Scire Facias*, 126. *Co. Litt.* 14. b. and N. (4). 309. a. 2 *Bla. Comm.* 175. 2 *Co.* 61. a. *Perk.* S. 88. *Kitch.* 153. a. *Touchst.* 238. 242. 253. 1 *Ves.* 175. 177. *Cunningham v. Moody.* 2 *Atk.* 206. *Kinaston & Clarke.* *Gilb. Rents*, 23.

(y) See *ante*, ch. 1. s. 3. p. 73. and s. 4. p. 85. livery

livery of seisin on a gift or sale of an estate in possession; such attornment being originally *coram paribus*, and in later days sufficiently attested (z). And for this reason, a reversion could not be granted over to take effect *in futuro* any more than an estate in possession (a).

Thus where A. was tenant for life, with remainder to trustees for preserving contingent remainders, with remainder to the first and other sons of A. in tail, with remainder to the heirs of the body of A., with remainder to the right heirs of the father of A. (who was the deviser); and A. made a lease and release to B. in trust for the payment of his debts, &c. and levied a fine of the lands, but suffered no recovery; it was held by Lord HARDWICKE, that A., by such conveyance,

(z) See *Plowd.* 25. 152. *Gilb. Ten.* 81. *Co. Litt.* 309. a. *Touchst.* 253. *Sulliv. Lect.* 119. 2 *Bla. Comm.* 317.

(a) *Plowd.* 155. 483. 8 *Co.* 74. *Brooke, Grants,* 60. 2 *Bla. Comm.* 165. and see another reason in *Plowd.* 155. b. and 197. b.

had

had altered the course of the descent of the reversion, so that it should go to the heir of A. of the whole-blood (*b*).

And this principle, that a remainder or reversion on a freehold will admit of no mesne seisin, while it continues in a course of descent, and such acts of ownership have not been exerted, presents a solution of the question, Whether a remainder or reversion on a freehold shall be subject to the debts of the *mesne* remainder-man or reversioner?

See 2 *Atk.*
206. *Kinaston*
v. Clark.

In *Robinson v. Tonge* (*c*), it is said of an advowson, that "as it may be sold, and comes to the heir by descent, it is reasonable it should be assets."

Now, though a remainder or reversion on a freehold may be sold, yet it may not come to the heir by descent from the very person who contracted the debt: And

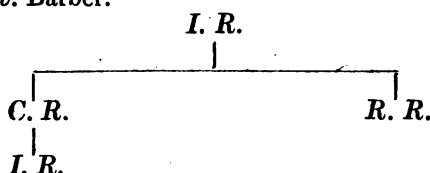
(*b*) 9 *Mod.* 363. *Stringer v. New.*

(*c*) 3 *Pr. Wms.* 401.

therefore,

therefore, a distinction should be made between extending it in the debtor's life-time (as he has power over it), or in the hands of his devisee (as the remainder or reversion is devisable, and the devisee claims under him who contracts the debt). And it should seem that, if judgment be had in the debtor's life-time, it will bind the property*, though no execution be taken out till the property descend to others: But where no judgment be had in

* *Judgment* by a mesne reversioner shall bind, but not a bond. See 4 *Vin.* 451. Charge (A). *pl.* 17. *Giffard v. Barber.*



I. R. (the elder) tenant for life:—*C. R.* and *I. R.* in tail:—reversion in *I. R.* (the elder) in fee. *I. R.* (the elder) entered into a bond:—*R. R.* bound, as having assets from his father *I. R.* (the elder). *Kellow v. Rowden*, *Carth.* 126. So note *I. R.* (the elder) was not a mesne but original reversioner, and as *R. R.* had the reversion as *heir* to the very person who made the bond, he could not plead *Riens per Discent*. So in *Kinaston v. Clarke*, 2 *Atk.* 204. In *Tweedale v. Coventry*, 1 *Bro. C. C.* 240, Sir *R. W.* devised the reversion to pay debts.

the

the debtor's life-time, and the stock of descent be not changed by such mesne, it should seem that the person taking such remainder by descent would *not* be subject to the debts of a *mesne* remainder-man or reversioner; as he would not take by descent from *him*, but from the original donor; and so paramount the mesne's charges (*d*).

But if no such act of ownership be exerted by the mesne remainder-man or reversioner; or if such remainder or reversion be not taken in execution for the debt or other act of the mesne owner; such remainder or reversion cannot be subject to *possessio fratris*, dower (*e*), or curtesy (*f*),

(*d*) See *Bro. Assets*, pl. 19. and see also 1 *Bro. C. C.* 240. *Marchioness of Tweeddale v. Earl of Coventry & al.* and *Pasch.* 24. *Ed.* 3. 47. (A). *Bro. Execut.* 143. *Recov.* 13. *Fitz. Abr. Recov.* 14.

(*e*) *Bro. Estates*, 67. *Fitz. Abr. Dower*, 55. 166. 8 *Co.* 96. a. *Perk. S.* 315. 317. 330. 340. 445. *F. N. B.* 150. A. *Finche's Law*, b. 2. c. 3. p. 125. *Cro. Eliz.* 316. *Cordal's case.* *Co. Litt.* 31. a. 32. a. and b. 35. a. and b. *Kitch.* 160. b.

(*f*) *Bro. Ten. par le Curtesy*, 4. 10. *Perk. S.* 467. *Dyer*, 357. pl. 44. *Co. Litt.* 29. a. and b. *Finche's L. b.* 2. c. 3. p. 125. *Kitch.* 159—160.

And,

And, therefore, if land be given in tail, and the reversion in fee-simple descend or come to the tenant in tail, yet, during the estate-tail, he cannot be seised of such reversion so as to make a POSSESSIO FRAT-

Reversion on
an estate tail.

[112]

TRIS: As where a person, having issue a son and a daughter by one wife, and a son by another, gave his land to his eldest son in tail: the father died, and the fee descended to the eldest son, who afterwards died without issue: and it was held, that the youngest son should have the land, and not the daughter, by reason that it was in reversion, and not vested in possession in the eldest son, during the estate tail: as it is a POSSESSIO FRATRIS which makes the sister to inherit, and NOT a REVERSIO FRATRIS (g).

[113]

Thus,

(g) *Brooke, Descent, pl. 13. 30. Scire Facias, 126. Estates, 6. Garde, 87. Fitz. Abr. Descent, pl. 5. 9, 10, 11. Assize. 327. Dyer, 89—90. pl. 1—6. and 325. pl. 38. Kitch. 109. a. 110. a. 153. See 3 Co. 42. a. Dyer, 325. pl. 38. Plowd. 230. Co. Litt. 11. b. 14. a. and b. 15. a. 191. b. Perk. s. 88. F. N. B. 196. K. 220. D. Noy's Max. 23. ch. 4. Carth. 126. Kellow & Rowden. Gilb. Ten. 13.*

1 Vesey,

Thus, while the estate-tail continued, he could not be ACTUALLY SEISED of the reversion

¹ *Vesey*, 174. *Cunningham v. Moody*. And see the case of *Jenkins on demise of Harris and wife against Prichard and others*, in ² *Wils.* 45. And note, that that case is mis-reported in *Wilson*: as it was really determined, it directly supports the doctrine here laid down. *It was determined in favour of the daughter by the second ventre.*

Indeed, the facts as stated in *Wilson*, (and which are there truly stated,) together with the reasoning of the court, must have led to this conclusion; and the judgment is most evidently mis-stated or wrongly printed *.

In a note of this case, as taken by Mr. Serjeant Hewitt when in court on the argument, the adjudication is thus given:

Jenkins on demise of Harris and wife,	}	In this case it was clearly agreed, that by the settlement of 1716 David Smith was tenant for life; his wife was tenant in tail, with the reversion in David Smith.
against		
Prichard and others.		

And thereupon two points were made.

1st. Whether that reversion in fee descended upon the two daughters of David, viz. Elizabeth by his first wife, and Ann by his second wife, in such manner as that upon the determination of the estate-tail, which descended upon Elizabeth, and from her upon her son,

* [See this error noticed also by Lord Alvanley, Ch. J. *3 Bosanq. & Pull.* 658.]

reversion in fee-simple, so as to turn the descent ; for he could not be seised of *both* in

and expired by his death without issue; it should go in moieties, viz. one moiety to Ann, and the other to the heirs of Elizabeth? or, whether it should not go all to Ann as heir to her father, who was last actually seised of the reversion?

2dly. Whether an actual entry ~~was~~ not necessary to have been made by the lessors of the plaintiff before the bringing of this ejectment, in order to avoid the fine levied by Job Gilbert and his wife?

As to these two points, upon full argument, the Judges were of opinion :

1st. That though the reversion descended upon the two daughters of David on his death, yet they were not actually seised of that reversion during the continuance of the estate-tail, but the same was expectant thereon. And as whoever takes by descent must take as heir to him who was last actually seised, therefore Ann took the reversion wholly as heir to her father. And as to this, 1 *Inst.* 14, 15. and *Kellow and Rowden in Carthew and Shower*, were held to be authorities in point.

2dly. The Judges held that as this fine was stated in the case to be a fine without proclamations, an actual entry was not necessary to avoid it; and that they would not carry the necessity of an actual entry to avoid a fine one jot further than it had been carried in the case of *Dormer and Fortescue*, which was on a fine with proclamations, and not on a fine merely at common-law without proclamations, as this was :

L

Wherefore

in possession at one and the same time; and an estate-tail will *not* merge in a fee *(h)*.

*Apres Possi-
bilitie.*

But had he become TENANT AFTER POSSIBILITY OF ISSUE EXTINGUISHED, it would have been otherwise. For though, as to some respects, the estate-tail may be said to have continued after possibility, &c. in the tenant during his life; yet, in other respects, it in a manner ceased, and the tenant or donee would have been *quasi* tenant for life only; when such his estate would merge in the fee, which would then become executed IN POSSESSION, and, consequently, be subject to POSSESSIO FRATRIS, DOWER, AND CURTESY; as in the following cases:

[114]

Merger.

Wherefore the *postea* was delivered to the plaintiff.

And that such was the judgment in this case, the Author of this Essay was also assured by a son of the person under whom the defendants claimed, and who, in consequence of such decision, refunded the mesne profits of the estate in question.

(h) *Plowd.* 230. 296. 2 *Co.* 61. a. 8 *Co.* 74. b. 75. a. *Kitch.* 153. &c. *Perk.* s. 88. 2 *Bla. Comm.* 177. ch. 11.

Lands

Lands devisable by custom were given to husband and wife in special tail, the remainder to the husband in fee; the husband devised such remainder to the wife, and died without issue: the heir of the husband entered, and was ousted, and then brought assize, and was barred, IN THAT THE FEE WAS VESTED IN THE WIFE, AND HER FRANK-TENEMENT MERGED; for she was tenant in tail *after possibility*, &c. (i). Subject to *possessio fratris*.

So where lands were given to husband and wife in special tail, with remainder to the heirs of the body of the husband; the wife died without issue had between them, and the husband took another wife, and died; and it was held that THE SECOND WIFE SHOULD BE ENDOWED (k). To dower.

So

(i) *Brooke*, tit. *Devise*, 42. *Co. Litt.* 28. a. 11 *Co.* 80. b. in *Lewis Bowles's case*, and the books referred to in (k) and (l) in the two following pages.

(k) *Vide Hil.* 50. *Ed.* III. f. 4. *pl.* 9.

And see also *Fitz. Ab. Dower*, 52. *Bro. Dower*, 25. *Perk. S.* 338. and *Kitch.* 161. b. where the same

To curtesy.

So where lands were given to husband and wife in special tail ; remainder to I. in tail ; remainder to the right heirs of I. The husband died without issue, his wife surviving, who was now become tenant after possibility, &c. and afterwards she took another husband, and had issue, when I. died without issue, the wife being his right heir, who afterwards died : and it was held that **THE SECOND HUSBAND SHOULD BE TENANT BY THE CURTESY :** for when the fee descended to the wife, she was tenant after possibility of issue extinct, and the freehold was merged or absorbed in the fee ; and so the wife had the fee **IN POSSESSION (l).**

[116]

Reversion on
estate in
dower.

If the heir enter, and his entry be **DEFEATED BY THE ENDOWMENT OF HIS**

case is cited. And note, that in the *French edition* of the latter writer of 1592, it is correctly stated. But in many of the *English editions*, (p. 322. of 1675-317. of 1656, &c.) it is erroneously said that the second wife shall *not* be endowed ; which error I find also in some of the French editions.

(l) *Brooke, Estates*, 25. *Tenant par le Curtesie*, 4 : and *Kitchen*, 159. b.

MOTHER,

MOTHER, he can have NO ACTUAL SEISIN OF the REVERSION OF THE THIRD PART, while such part continues IN DOWER (m). Nor can he have any ACTUAL SEISIN of lands of which his father is TENANT BY THE CURTESY (n); nor of such as ARE EXPECTANT UPON A LEASE, OR OTHER ESTATE, FOR LIFE (o).

Thus when there is an anterior estate of FREEHOLD, the actual seisin is in the possessor of *such* estate; and, consequently, [117]

(m) See *ante*, ch. 1. s. 3. p. 66. *Brooke, Descent*, 19. *Kitch.* 109. a. 159. b. *Brooke, Ten. par le Curtesie*, 19. *Gilb. Ten.* 27. *Co. Litt.* 241. b.

(n) See *ante*, c. 1. s. 3. p. 80. See *Litt.* s. 394. *Co. Litt.* 241. b. *F. N. B.* 194. D. and E. and see 2 *Inst.* 301. and 3 *Co.* 23. b.

(o) *Brooke, Descent*, 28. *Done*, 55. *Estates*, 67. *Kitchen*, 109. b. *Cro. Car.* 411—12. *Reeve & Malster. Cro. Eliz.* 315—16. 8 *Co.* 96. a. *Co. Litt.* 239. b. 241. b. *Gilb. Ten.* p. 15—19. *Co. Litt.* 11. b. 14. a. note (6). 17. b. and note (4). 3 *Co.* 6. b. See *Ibid.* 42. a. See 1 *And.* 31. *pl.* 74. and 1 *And.* 353. *pl.* 322. *F. N. B.* 197. b. and 9. b. *Robins. on Gavelk.* b. 1. c. 6. p. 105. *Moore*, 868. *pl.* 1201. *Smales & Dale. Noy's Max.* 23. c. 4. *Carth.* 128. *Kellow & Rowden. Jenk.* 242. *pl.* 25.; and 1 *Ves.* 176. *Cunningham v. Moody.*

the person entitled to an interest expectant thereon cannot possibly be said to be actually seised thereof on a mesne descent (*p*).

Executory
devise.

When ONE ESTATE IN FEE-SIMPLE, therefore, IS LIMITED ON ANOTHER, by way of executory devise; it must fall under the same rule; and THE DESCENT

Contingent
fee.

of the CONTINGENT FEE cannot allow of ANY MESNE SEISIN which might turn such descent (*q*).

Estates in re-
version and
possession.

“ Thus the principles which apply to the descent of an estate IN POSSESSION, do not apply to the descent of an estate in remainder or reversion expectant on an ESTATE OF FREEHOLD: but they apply when the particular estate is only FOR YEARS; a tenant for years being considered merely as the bailiff of the freeholder, and to hold the possession for him (*r*).”

(*p*) See *ante*, c. 1. s. 1. p. 27.

(*q*) See the next section, p. 122.

(*r*) Note (2) to *Co. Litt.* 239. b. (Hargrave and Butler's edit.) See also *ante*, ch. 1. s. 2. p. 48.; and this sect. p. 108.

SECT. II.

[118]

To whom he must make himself Heir, who claims where there has been no Mesne Seisin.

IN the last section we have seen that there can be no mesne seisin of any estate expectant upon a freehold, when such estate continues to descend, and the particular acts of ownership have not been exerted; and, therefore, it must inevitably follow, that there can be no mesne heir (as such) capable of turning the descent. He who claims, must, consequently, make himself heir to him in whom such estate first vested by purchase; or, in case such acts of ownership have been exerted, to the person who last exerted them: thus, as in a case before put (a), if a gift in tail be made, and the reversion descend to the eldest son (by a first ventre) of the donor;

No mesne seisin.

First purchaser.

Half-blood.

(a) See the last section, p. 112.

[119]

which eldest son, being also tenant in tail, dies, leaving a sister of the whole, and a brother of the half-blood ; the brother of the half-blood shall succeed to the reversion, and not the sister of the whole. The reason of this is evident : the reversion descends, on the death of the eldest son, not to the right heirs of such eldest son, (for such eldest son was never actually seised of the reversion, but of the estate-tail on which it was expectant,) but to the right heirs of the father, or of the person who made the gift, or of him to whom limited, given, &c. And therefore, as the younger son (by the second ventre) was, on the death of the eldest (by the first ventre), the right heir of their common father, the donor (for he was of the whole-blood to him, and, being a male, shall be preferred to an elder female, and so take place of his sister (*b*)—) such younger son

(*b*) See *ante*, c. 2. p. 88. canon ii. 2 *Bl. Comm.* 212. ch. 14. and *On Descents*, 21. *Hale's Com. Law*, 262. ch. 11. *Robinson on the Law of Inheritances in Fee-simple*, 38. ch. 5. See *Litt. s. 8.* and *post*, next sect. p. 124.

shall

shall succeed to the reversion as well as to the estate-tail (c).

When, therefore, a reversion or remainder expectant upon an estate of freehold continues in a course of descent, without such acts of ownership exerted, such reversion, &c. still continually devolves, on the death of each particular heir, to the person who can *then* make himself heir to the donor or purchaser, without any regard to the very heir of the precedent person who succeeded to it *by descent*; till, when the particular estate is determined, it ultimately vests *in possession* in him, who, *at such determination*, is the right heir of such donor, purchaser, or original remainderman. For as there was no intermediate person actually seised of such reversion or remainder, no one could, as we have said, be the mean of turning its descent, and becoming a new stock or *terminus*; but

Heir of the
first purchaser.

[120]

(c) See *ante*, ch. 1. s. 4. p. 86. (l). [See also, as to the half-blood succeeding, 3 *Bos. & Pull.* 643. *Doe d. Andrew v. Hutton. & post* [122.] (g).]

such

such stock must yet be the donor, purchaser, or remainder-man, and must so continue (if no alienation be made) till such estate shall become VESTED IN POSSESSION; and, consequently, it will be absolutely necessary to prove on every devolution a descent, not from the immediate predecessor who took *by descent*, (for with him, as such, we have now nothing to do,) but from the donor, purchaser, or original remainder-man. Whoever, therefore, can make himself heir to such donor, &c. will be entitled to the inheritance in reversion or remainder, though expectant, but yet not so as to be capable of transmitting it to *his own* right heirs, (as such,) except by granting it over:^(d) till it becomes vested in possession, by the determination of the particular estate which supported it, or whereon it was expectant, (when it would cease to be a reversion or remainder,) in him who should be, at that time, the right heir of the donor, &c. which person would then be-

(d) See *ante*, last sect. p. 110.

come the stock of descent, and him from whom the future pedigree must run (*e*), on his obtaining an *actual* seisin of it (*f*).

So also with respect to contingencies and executory devises : thus on a devise to G. in fee ; but if he happened to die under the age of twenty-one years, leaving no issue, then to P. in fee : after the decease of the testator, P. died in the life-time of G. who afterwards died under the age of twenty-one, and without issue : it was held, that the lands vested in P.'s heir at law, upon the happening of the contingency, (viz. on the death of G. under age, and without issue,) but that the interest,

[122]
Contingen-
cies and
executory
devises.

(*e*) See *Fearne's Conting. Rem.* 449. (3d edit.) *Co. Litt.* 11. b. 14. a. and N. (6). 14. b. 15. a. 3 *Co.* 42. a. *Cro. Car.* 411—12. *Reeve & Malster.* 8 *Co.* 96. a. 1 *Co.* 95. 99. *Plowd.* 56. 113. 485. 489. *Brooke, Descent,* 2. and 58. *Done,* 5. and 21. *Scire Fac.* 126. *Cro. Eliz.* 334—5. *Frederick v. Frederick.* *Dyer,* 129. pl. 63. *Bonvil v. Payne.* See 2 *Com. Dig.* 402. Copyh. (K. 11.) 3 *Ibid.* 51. *Descent,* (C. 2.) *Robinson on Gavelkind, Appendix,* (last page but two.) *Kitch,* 109. b. 1 *Ves.* 174. *Cunningham v. Moody.*

(*f*) See ch. 1. sec. 1. p. 23, and 42.

while

while it was contingent, did not so attach in G. who was heir at law to P. on her decease, as to carry it on his death to *his* heir at law, who was not heir at law to P. but that it vested in that person WHO WAS HEIR AT LAW TO P. (the first purchaser) AT THE TIME OF THE CONTINGENCY HAPPENING (g).

SECT.

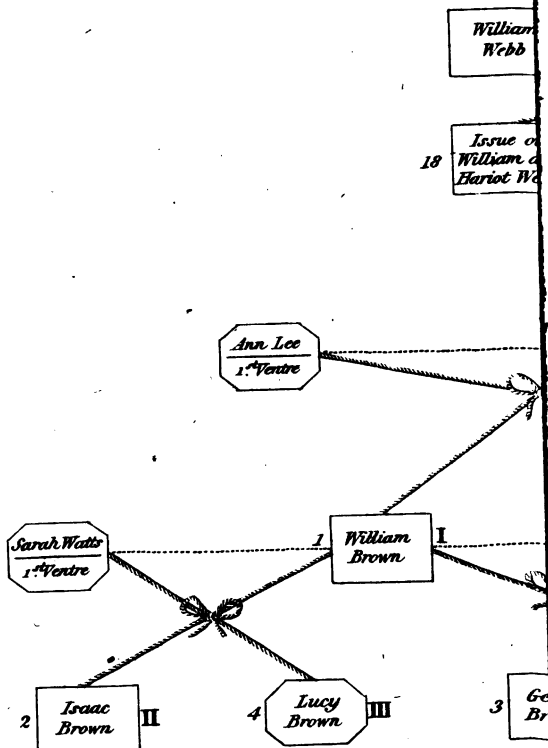
(g) See 2 *Wils.* 29. Goodright and Searle; and cited also in *Fearne on Contingent Rem.* 448. (3d edit.) And see *Cro. Car.* 410—13. Reeve & Malster. *Hobart*, 33. Counden & Clerke. *Plowd.* 485. 489. 3 *Com. Dig.* 51. Descent, (C. 2). 2 *Hughes's Abr.* 1484. tit. *Possessio Fratris*; and compare with *Brooke, Done*, 8.; and *Co. Litt.* 298. a. [So where I. A. devised all his lands to S. A. (his son by the first venter) when he should come to the age of 21 years, but if he should die before he came to that age, and D. A. (the testator's daughter by the second venter,) should be then living, he gave the same to her when she should attain 21 years: testator died leaving no other children, and then S. A. died under age and without issue: it was held, that on the death of S. A. the inheritance vested in D. A. his sister of the half-blood, in preference to his uncle of the whole-blood. 3 *Bos. & Pull.* 643. *Doe d. Andrew v. Hutton.*

So also upon a devise to the testator's wife B. of all his real and personal estate, &c. in trust for the education and maintenance of his only daughter M. till



TABLE OF DESCEN

The common Figures 1. 2. 3. &c. shew the descent of an Estate expectant upon a precedent Freehold—The Roman Numerals I. II. III. IV. &c. shew the descent of an Estate in Possession.



SECT. III.

[123]

Explanation of the Table of Descents.

FOR the more fully elucidating the doctrines inculcated, and in order to shew at one view the different manner in which an estate VESTED IN POSSESSION and one IN REMAINDER OR REVERSION EXPECTANT UPON A FREEHOLD would descend, I have subjoined a table or calendar, which I will now proceed to explain.

till she arrived at the age of 21; and in case of *M.*'s death before she arrived at 21, then a devise of the whole of his said estates and effects to *B.* his wife; the Court held, that *M.* the daughter took a present limited fee, either by descent or by implication under the will, upon the contingency of her dying under 21; and that *B.* the mother took an executory devise in fee, which upon her death before the daughter attained 21, descended to the daughter; and that the daughter afterwards dying before she attained 21, such executory interest, which did not unite with nor was merged or extinguished in the fee which she had *ex parte paterna* during her life, descended to her heirs *ex parte materna*. 15 *East*. 174. *Goodtitle d. Vincent v. White*. and see 2 *New Rep.* 383.]

Suppose

Descent of a
remainder on
a freehold.

Suppose then an estate given to Henry Warden in tail, with remainder over in fee to Benjamin Brown.

On the death of Benjamin Brown, the remainder would descend, 1st, to his eldest son, (by Anne Lee,) William Brown; and from him, 2dly, to *his* eldest son, (by Sarah Watts,) Isaac Brown. Isaac dying without issue, we must again seek the right heir of his father William, as the representative of his grandfather Benjamin; for Isaac, having never been actually seised, could not transmit it to *his own* heirs (as such).

[124] Now we find that William Brown left a daughter by his first wife, and a son by his second; these his children are both in the same degree; but the younger being a son, and so more worthy of blood, he (George) shall (3dly) succeed to the inheritance in exclusion of his elder sister (a). George dying without issue, we must again seek the heir of his grandfather, which now undeniably is (4thly) Lucy. Lucy dying

(a) See the last sect. p. 119. (b).

likewise

likewise without issue, whéreby her father's issue are extinct, we must still inquire for the heirs of the remainder-man, whom we now find to be (5thly) John Brown (his son by his second wife). The remainder then descends from John to (6thly) *his* eldest son Edmund ; and from him to (7thly) *his* only son James. James dying without issue, we must once more seek the heir of the remainder-man ; whom we find among the yet living issue of John. John leaving a daughter by one wife, and a son and daughter by another, the remainder descends (8thly) to Henry his son by Frances Wilson, as of the worthiest sex : but he dying without issue, we again seek the heir of Benjamin, and find that John left two daughters also by different wives ; these daughters being in the same degree, and both equally the children of their common father, through whom they derive their title to inherit (*b*), shall

[125]

(*b*) SISTERS OF THE HALF-BLOOD cannot succeed *as heirs to each other* ; but they *may* succeed *as the*

shall (9thly) succeed as parceners. One of these daughters dying without issue in the

the heirs of their common father, being equally his children.

Si vero habuerit quis plures uxores, & ex qualibet earum filiam vel filias, omnes filiæ erunt pares ad hereditatem patris, eodem modo ac si omnes essent ex eadem matre. *Glanvill. Lib. 7. c. 3.*

Poterit etiam quis habere plures filias de una matre, et plures de alia, et sic sint omnes participes, et capaces hæreditatis paternæ descendentis, quantum ad hæreditatem paternam descendentem, non erunt tamen participes et capaces quantum ad perquisitum fratris vel sororis qui fuerint de eadem matre. *Bract. Tr. 1. lib. 2. cap. 30. s. 3. fol. 66. b.*

Si Titius plures filias reliquerit de una matre vel diversis genitas, omnes pariter vocandæ sunt ad successionem & ad capacitatem hæreditatis paternæ, & erunt pro uno hærede quamvis animæ diversæ. *Fleta. lib. 6. cap. 1. s. 17.*

Pluralite de femmes, sicome est de soers parceners, l. ql. q. eles soient engendres d. une mere, ou d. plusurs, q. se proufrent. toutes en leu de un heire, & nule ne est plus receyvable d. autr. ne nule ne purra estr. autry heire. *Brit. Cap. 119. De Success.*

See also *M. 19. Ed. II. p. 628. Mayn. Fitzh. Abr. Disc. 13. Quare Imped. 177. Bro. Desc. 20. 27. Mordanc. 43. Seisin, 42. F. N. B. 36. E. 197. G. Dyer, 291. b. pl. 69. 325. pl. 38. Kitch. 109. b. 110. a. Hale's Comm. Law, 264. N. (x). 266. ch. 21. Robins. on Inherit. 36. c. 5. 2 Bl. Comm. 231. ch. 14. Calth.*

the life-time of the other, the other shall then succeed to the whole ; for she does not claim as heir to her deceased sister, but as the now only heir of her father. But the surviving sister dying also without issue, we pursue our old inquiry, and ask again for the heir of Benjamin the remainder-man : and as his male issue is now extinct, and as he left two daughters, (by different wives,) we find that they or their issue shall next inherit (10thly) as heirs to him. On their death, or that of their issue, whereby the descendants of the remainder-man are become extinct, we must yet seek *his* right heir ; and this we find to be (11thly) Bridget Brown, his sister of the whole-blood. For though the half-[126] Half-blood. blood succeed equally with the whole

Calth. 87—8. and the case of Jenkins *d.* Harris and wife *v.* Prichard & *al. ante*, 113. N. (g).

The same law as to sons or daughters in gavelkind. 8. *Mod.* 208. *Turner v. Turner.* *Robins. Gavelk.* b. 1. c. 6. p. 100—105. 1 *Freem.* 45. *Foxe v. Smith.*

And see also *Robins.* b. 1. c. 3. p. 37. where a custom is noticed for lands to descend to, and be partible among, brothers by the first ventre only, to the exclusion of those by a second. See too *Co. Litt.* 140. b.

among THE DESCENDANTS of *Benjamin*, according to the worthiness of sex, or priority of birth; yet, such remainder being legally vested in Benjamin, he alone is the person from whom it must be claimed, and to whom the person claiming must make himself heir: for those whom we have called the half-blood among his descendants, are only of the half-blood to each other, but are equally derived from himself. But those of the half-blood *above him*, being not (by the terms) derived from the same couple of ancestors as he himself is, cannot possibly succeed as heirs to HIM. And, therefore, though Timothy Brown is the right heir (on the death of Benjamin and his issue) to Joseph Brown, their common father; yet it is not *his* heir that we seek, but the heir of Benjamin; and as he is not the heir of Benjamin, (being but of the half-blood *to him*,) he shall not succeed to the remainder; but such remainder shall descend to Bridget, his sister of the whole-blood: but in case she die without issue, it shall then go (12thly) to Thomas Brown,

Brown, her uncle; and the issue of Joseph, by Emma Atkins, be excluded, as they can never be the right heirs of Benjamin, the first purchaser, from whom it must still be claimed. On the death of Thomas without issue, the remainder shall (13thly) go to *his* uncle, Daniel Brown; and not to his brother, Joseph Brown; because Thomas having been never seised, it would not on his death go to *his* heir, but to the heir of Benjamin; and Joseph being the *father* of Benjamin, could never be (as such) his heir (c): And Stephen, not being derived from the same couple of ancestors as Benjamin, shall not succeed. From Daniel it shall (14thly) go to Abraham, the son of Edward and Barbara Brown.

But had it been an estate IN POSSESSION, Descent of an estate in possession. it would have descended very differently. It would then have gone from Benjamin to (I.) William; then to (II.) Isaac; and from Isaac to (III.) Lucy Brown; who being the person NOW LAST ACTUALLY SEISED, (supposing the persons entitled continually

(c) See *Show.* 246.

[128] to have gained an actual seisin,) IS BECOME THE STOCK OF DESCENT; and therefore we must now seek for the heir of *her*, and not of Benjamin. Her father, William Brown, left issue a son, (George,) by his second wife; but this son being but of *the* HALF-BLOOD TO LUCY, shall never inherit as heir TO HER, though the land should escheat to the lord (*d*). We then must go one step higher; and here we find (IV.) her aunt Susannah to be her heir of the whole-blood: Susannah dying without issue, the estate again devolves; and as we suppose her to have been ACTUALLY SEISED, we must find out who is now heir to HER: and this we discover to be (V.) George Brown, the son of her brother William, who, though of the half-blood to Lucy, is of the whole-blood to Susannah, and, therefore, shall inherit TO HER (*e*). And now all the issue of his grandfather Benjamin, by his first wife Anne Lee, being extinct, we must go to (VI.) Bridget,

(*d*) *Vide Mich. 5 Ed. II. p. 147—8. Mayn.*

(*e*) See *Litt. sec. 8.*

the daughter of Joseph and Elizabeth Brown; for the issue of Benjamin by Jane Smith, being of the *HALF-BLOOD to GEORGE*, shall never inherit as heirs to *HIM*. But Bridget succeeding, and having been *ACTUALLY SEISED*, we must now have recourse to *HER* heir; and this we find to be (VII.) John Brown, the son of Benjamin by Jane Smith; for, though of the half-blood to George, he is lineally descended from the only brother of the whole-blood to Bridget, and shall, therefore, (as the elder issue of Benjamin are now extinct,) succeed to *HER* (*f*). From John it descends to (VIII.) Edmund; and from Edmund to (IX.) James; and from James to (X.) his aunt Penelope; and from Penelope to (XI.) *her* aunt Catherine: for though the issue of her father, John Brown, by Frances Wilson, are but of *the* *HALF-BLOOD to PENELOPE*, yet they are the now-only representatives of *JOHN*, who was the brother of *the* *WHOLE-BLOOD to CATHERINE*; and, therefore, the estate

(*f*) See *Litt.* sec. 8.

M 3

shall

shall descend FROM HER to (XII.) Henry Brown; and from HIM to (XIII.) Felicia; and she being the last of the issue of her grandfather Benjamin, we find Thomas, the son of Philip and Esther, to be (XIV.) HER heir: for as to Bridget, the daughter of Joseph and Elizabeth, it has already passed her; and Timothy, the son of Joseph and Emma, is but of the HALF-BLOOD to FELICIA, and therefore shall [130] NOT succeëd TO HER; but he *shall* succeëd as heir TO THOMAS, being the now-only son of *his* brother Joseph (his brother of the whole-blood). From Timothy (XV.) it goes to (XVI.) Daniel; and from Daniel to (XVII.) Stephen; and from Stephen to (XVIII.) Abraham Brown and his issue, &c.

As it was the principal intention of the Author, when he compiled this work, to connect what other writers had incidentally treated of, or to explain what they had left in obscurity, he contented himself with tracing, in the annexed table, the
descent

descent of a reversion or remainder on a freehold, and that of an estate in possession, in the *paternal* line only of the purchaser. The succession as to the *maternal* line he conceived as sufficiently marked out in the learned pages of our elegant commentator; and, therefore, thought it unnecessary to detail what he has advanced. But, as it has been suggested that it would render his scheme more complete by tracing such descent through the maternal line also, he has been induced to add the following remarks.

On the extinction of the issue, and also of the *paternal heirs*, of Benjamin Brown, the remainder or estate in possession, for the descent of *either* must, in this respect, be perfectly the same, would go to the right heirs of (XIX. & 15.) Barbara Finch; on their failure, to those of (XX. & 16.) Margaret Pain; and, on default of *her* heirs, to those of (XXI. & 17.) Esther Pitt; and, for want of such, to those of (XXII. & 18.) Elizabeth Webb, the mother

of Benjamin. The rule always being to give the preference to the paternal line, and not to have recourse to the maternal till the paternal be exhausted.

In tracing the paternal line, we begin with the father of the person last seised, or first purchaser, and proceed *upwards* through the grandfather, great-grandfather, &c. as far as the line can be pursued. When the heirs on this part can be no longer discovered, we begin with those of *the wife of that paternal ancestor with whom our discoveries ended*, and continue, in a contrary direction, proceeding *downwards* to the heirs of the mother: Thus it first goes to (11.) Bridget; then to (12.) Thomas; then to (13.) Daniel; then to (14.) Abraham, &c.; but if we seek the heir of Benjamin in the maternal line, we begin with (15.) Barbara; then proceed to (16.) Margaret; then to (17.) Esther; and then to (18.) Elizabeth.

As a purchaser takes his feud *ut antiquum*,

quum, it is presumed to have *descended paternally* (g); and, therefore, it has been determined that the brother of the grandmother shall succeed before that of the mother (h). So, if no heir can be found to his great-grandfather, and the estate in question cannot be *proved* to have strictly descended from the great-grandmother, the law will not presume that it descended from her, but that it came from the great-grandfather's *father*; but if his issue be extinct, it will still seek for the paternal heir, and suppose that it came from the father of the latter; but when it can trace such paternal heir no further, it must, necessarily, have recourse to the female line: And as it is with Edward Brown (see the table) that its presumption ceases, it must there begin with the maternal heirs. It uniformly preferred the male line to the female; the father to the mother; the grandfather to the grandmother, &c.; so here in Barbara Finch

(g) See *post*, ch. 5.

(h) *Plowd.* 444. *Dyer*, 314. a. *pl.* 95. *Clere v. Brook*.

such

such preference ends. It presumed it to have descended to Edward, *paternally*; but it can trace his paternal line *no further*; it, therefore, considers it as coming from Barbara. In other terms, as the estate cannot be *proved* to have come to Benjamin Brown from *his* mother Elizabeth, it is presumed to have descended from his *father*, Joseph. To Joseph, indeed, it might have come from his mother, Esther; but as it cannot be *shewn* to have done so, it is *supposed* to have come from Philip. To him it might possibly have descended from Margaret; but this not appearing, it is supposed to have been derived from Robert. To Robert it might have descended from *his* mother, Barbara; yet the presumption is in favour of his *father*, Edward Brown. But as the pedigree or line of the Browns can be no further traced, it is presumed to have come from Barbara Finch; and, consequently, as there is no one to carry the presumption from her, ~~HER~~ her heir shall be considered as having title to the premises. If no heir of Barbara can be found, the presumption is in favour of, and remains with,

with, Margaret Pain: if *her* heir cannot be discovered, it is then in favour of Esther Pitt; (for Dinah Ward was not an ancestor of Benjamin Brown the remainder-man, or person last seised; and, therefore, it could *not* have descended to him from *her*). If no heir can be found to Esther, it shall go to that of Elizabeth Webb; as no other person can shew the probability to preponderate in his behalf; (Emma Atkins being in the same predicament with Dinah Ward).

The question, however, whether the line of the father's mother, or that of the father's paternal grandmother, should first succeed to the inheritance of the son? has been a matter of much controversy; and, therefore, calls for a more particular investigation.

We are informed by *Plowden* (i), in his report of the case of *Clere v. Brook*, that Mr. Justice *Manwoode* affirmed that the

(i) *Comm.* 450.

former

former line should be preferred ; and in a note which is subjoined to his report of that case, he also tells us that he afterwards put the question to Mr. Justice *Manwoode* in the presence of Mr. Justice *Harper* ; and again, severally, to Mr. Justice *Mounson* and Sir *James Dyer* ; and that they were all of opinion, that the brother of the father's mother should first take : though the reporter has, at the same time, taken care to add that many were of a *contrary* opinion ; namely, that the brother of the father's paternal grandmother ought to have been preferred.

The doctrine, however, of Mr. Justice *Manwoode* has been adopted by Lord *Bacon* (k), by Sir *Matthew Hale* (l), and by the *Lord Chief Baron Gilbert* (m) ; while the contrary position has been maintained by Mr. *Robinson* (n), and Mr. Justice *Blackstone* (o).

(k) *Elements*, I. p. 3. *Tracts*, 37. edit. 1737.

(l) *Hist. Comm. Law*, 268, &c. edit. 1779.

(m) *Ten.* 19.

(n) *Law of Inherit. in Fee-simple*, ch. 6. &c.

(o) 2 *Comm.* 238. ch. 14.

The arguments of the latter writer were, however, controverted by an anonymous author, in a pamphlet, which appeared in the year 1779, entitled, "Remarks on the Laws of Descent; and on the Reasons assigned by Mr. Justice *Blackstone* for rejecting, in his Table of Descent, a point of doctrine laid down in *Plowden*, Lord *Bacon*, and *Hale* (p)." In a note to a late edition of the Commentaries, Mr. Justice *Blackstone* was vindicated by Mr. Professor *Christian*; and Mr. Professor *Christian* has, in his turn, been charged with inconsistency in his defence; and the tenets, both of the author of the Commentaries and his annotator, have been again denied by the same anonymous writer, in another pamphlet, which has recently made its appearance under the title of "Remarks on the Inconsistency of the Table of Descents, projected by Mr. Professor *Christian*, in the twelfth edition of the Commentaries, with the doctrine laid down by Sir

(p) This will be referred to as the "*First Pamphlet*."

William

William Blackstone, and by every writer on the Law of Descents."

Now it is, indisputably, laid down as law, *That, in the case of a purchase, (and, in our instance, Benjamin Brown took the remainder by purchase,) the paternal line shall always be preferred to the maternal; and that the heirs on the part of the mother shall never succeed till those on the part of the father be exhausted (q):*

That the father has two immediate bloods in him; viz. the blood of his father, and the blood of his mother (r): And

That a person taking lands by purchase in fee-simple, shall take them as a feud of indefinite antiquity (s).

These principles present a solution of

(q) *Litt. s. 4. and Co. Litt. 12. a. and b.*

(r) *Co. Litt. 12. a. vide Remarks, (First Pamphlet,) 8.*

(s) *Wright's Ten. 17. 180. 2 Bl. Comm. 220, &c.*
this

this question on which there has been such a contrariety of opinion; and, if the consequences of these principles be impartially and deliberately pursued, we shall, I think, be soon led to certainty on a point as to which, one would have supposed, even ingenuity itself could not have suggested a doubt.

If a purchaser, therefore, die without issue, we are to seek for his heir among the issue of his father: if none of those remain, we ask for those of his grandfather: if none of those are to be found, we pursue our inquiries among the issue of the great-grandfather; and so on *ad infinitum*; or, according to the annexed table, the issue of Józeph and Elizabeth Brown shall first take; then the issue of Philip and Esther; then those of Robert and Margaret; and, lastly, the issue of Edward and Barbara Brown (*t*). And we will suppose

(*t*) For the more easily consulting the Table of Mr. Justice

pose, that we can trace the male paternal line of Benjamin Brown, the purchaser, no further than to Edward, his paternal grandfather's paternal grandfather.

The question, therefore, will now be, Who is the next heir of Benjamin Brown? —The brother of Barbara Finch, (the paternal grandfather's paternal grandmother); the issue of David and Grace Pain; (the brother of the paternal great-grandmother, or Mr. Justice *Blackstone's* Class No. 10.); or the issue of Walter and Sarah Pitt, (the brother of the paternal grandmother, or Mr. Justice *Blackstone's* Class No. 11.)?

Justice *Blackstone*, the following list of corresponding names is subjoined :

Benjamin Brown,	-	-	-	John Stiles,
Joseph and Elizabeth Brown,	-	-	-	Geoffery and Lucy Stiles,
Philip and Esther Brown,	-	-	-	George and Cecilia Stiles,
Robert and Margaret Brown,	-	-	-	Walter and Christian Stiles,
				(Their issue, Class No. 8.)
Edward and Barbara Brown,	-	-	-	Richard and Ann Stiles,
				(Their issue, Class No. 9.)
David and Grace Pain,	-	-	-	William and Jane Smith,
				(Their issue, Class No. 10.)
Walter and Sarah Pitt,	-	-	-	Luke and Frances Kempe,
				(Their issue, Class No. 11.)

But

But, in order to come immediately to the question, we will suppose our inquiries, as to the male paternal line, to end in Philip Brown, the paternal grandfather; rather than in Robert Brown, the paternal grandfather's father, or in Edward, the paternal grandfather's paternal grandfather.

Now, we find, according to the position we have noticed, that Philip Brown, was composed of the bloods both of his father and mother; that of his father we suppose exhausted; but that of his mother remains in the issue of David and Grace Pain, (or in the Class, No. 10). It appears therefore, most evidently, from the authorities cited, that the blood of Robert is *not* exhausted; and, consequently, we must seek for his heir in his unexhausted blood, or in the issue of David and Grace Pain, (or in the Class, No. 10). Lord Coke says, expressly, that "the father has *two* immediate bloods in him—the blood of his father and the blood of his mother. *BOTH these bloods are* OF THE PART OF THE

N

FATHER:

FATHER: *and BOTH these bloods of the part of his father MUST BE SPENT, before the heir of the blood of the part of the mother shall inherit (u).*" And it is acknowledged by Lord Hale (x), that the collaterals of the father's mother, of the father's grandmother, and of the father's great-grandmother, *are of THE BLOOD OF THE FATHER.*

If, then, the paternal great-grandmother be of the blood of the father, she must, of consequence, be of the blood of the paternal grandfather, or of Philip Brown; and consequently, also, as the *paternal* line of Philip is supposed extinct, it should seem that the next heir must be found in his *maternal* blood, or in that of Margaret Pain, or in the Class, No 10.

Again: As the feud is held *ut antiquum*, it is supposed to have *descended* to the purchaser from his ancestors; and, as the pa-

(u) *Co. Litt.* 12. a. and b.

(x) *Com. Law*, 271.

ternal blood is always preferred, to have descended to him *paternally*. Now, if it had *actually* descended in the paternal line, (and an *actual* descent is, by the very terms, *presumed* (y)—), it may be considered as having been once actually vested in the purchaser's paternal ancestors; and, consequently, it may be supposed to have *actually* descended from the most remote. Now, if we suppose it to have actually descended from Philip Brown; that we can trace the paternal line no higher than Philip; that the blood of Philip was composed of the bloods both of his father and mother; and that his father's blood is exhausted; the brother of his mother, (or the Class, No. 10), must certainly be the heir to the premises: and the brother of Esther Pitt, (or the Class, No. 11), cannot possibly be entitled, while any of the former Class, (No. 10), be in existence.

If the *presumed* descent is *not* to be considered as an *actual* one, when compatible

(y) And see *Wright*, 180. 2 *Bl. Comm.* 212.

with the end of the presumption, there is no meaning in terms. As the law, therefore, presumes, that the feud descended *paternally*, such feud must be considered as having actually done so, while the consideration will answer the end for which such presumption was adopted. If it will not answer that end, the presumption, as to its paternal descent, ceases; and the law will deem the feud to have descended *maternally*, rather than it should escheat to the lord of the fee (z). Hence it admits the heirs of the *mother* of the purchaser, when those of the father are no longer to be found.

As the heirs on the part of the father are to be preferred, or, in other terms, as the feud is presumed to have descended to the purchaser from his father, the law inquires (in case of the death of the purchaser without issue) for the heir of the father; as he who ought to inherit to the father, ought, pursuant to an ancient

(z) *Pasch.* 49 *Ed.* III. *pl.* 5. *fol.* 11. b. 12. a.

axiom,

axiom (*a*), to inherit also to the son; for, in the consideration of the present question, we have nothing to do with the half-blood.

Now, if the feud be presumed to have descended to the purchaser from his father, and his father has left no issue, the next inquiry is, How did the father inherit it? If he inherited it from *his mother*, it must be *so proved*; and if it be *not so proved*, it will be presumed to have descended to him *from his father*; as the presumption is in favour of the male line.

On the presumption that it descended from the grandfather, and that the grandfather has left no issue, the question will then be, From whom did *he* inherit it? Here the presumption again returns, That *he* inherited it from *HIS FATHER*, or Robert Brown. But, according to our supposition, the male *paternal* line, or that of

(*a*) *Mich.* 12 *Ed.* IV. *pl.* 12. *fol.* 14. a. and see 2 *Bl. Comm.* 220. and 239—240.

Brown, can be no further traced than to Philip; the law *then* will presume that the feud descended to Philip *maternally*, and, consequently, from Margaret Pain; and, consequently, the next heir to the premises must be *her* brother, or the Class, No. 10.

Again: As the antiquity of the feud is merely *presumed*, no particular ancestor can be absolutely precluded from being the stock of the descent. The first presumption, indeed, is that the feud had descended from the male ancestor; but it might, by possibility, have descended from a female: it might have descended from the mother, or grandmother; the great-grandmother, or great-great-grandmother: All these lines, therefore, shall, in their turn, succeed to the inheritance of the son, on the extinction of the line which the law first enables to succeed.

Now the son might, by possibility, have inherited the feud from his mother, his
grandmother,

grandmother, great-grandmother, &c. as well as from his father, his grandfather, his great-grandfather, &c. but the presumption will be that it had descended in the *paternal* line. We can, however, trace that line no further than the paternal grandfather, Philip Brown; but *so far* we can trace it; and *so far* the presumption will carry us. If then we suppose that the son took the feud by descent from Margaret Pain, his paternal grandfather's mother, this presumption that he took it by descent from his father Joseph Brown, and that Joseph Brown took it by descent from his father Philip Brown, will be preserved; since both Joseph and Philip might have taken it by descent from *her*: and, consequently, *her* brother, or the Class, No. 10. must be entitled. Whereas, should we deem the feud to have descended from Esther Pitt, the purchaser's grandmother, and so first admit the class, N° 11.; should we not immediately contradict our first presumption, that it had descended from the *paternal* line; *i. e.* from Philip Brown,

to whom we *could* have traced it, presumptively? If, instead of considering it as descended from the purchaser's paternal grandmother, we regard it as coming from his mother, Elizabeth Webb, surely we must contradict our presumption still more grossly, since we must then exclude not only Philip Brown, but Joseph also. But, as it is agreed on all sides that the brother of Esther Pitt, or of the paternal grandmother, shall take before the brother of Elizabeth Webb, or of the mother (*b*), must not the brother of Margaret Pain, or of the paternal great-grandmother, be preferred to Esther Pitt? Will not every reason that can carry us to the line of the grandmother in preference to that of the mother, carry us also to that of the great-grandmother in preference to that of the grandmother? And, as the purchaser, his father, and his paternal grandfather, might have taken the feud from the paternal great-grandmother, Margaret Pain, while the purchaser, and his father only, could

(*b*) Clere & Brook. *Plowd.* 444. *Dyer*, 314. a. S. C.
have

have taken it from the paternal grandmother, Esther Pitt, must not the chance or probability, and, consequently, the presumption, be in favour of the former, or of the Class, No. 10? And, if we could have traced the male paternal line higher than Philip Brown, the chance or probability, and, consequently, the presumption, would, from the very nature of the thing, be proportionably increased, according to the remoteness of the female paternal ancestor.

Again: A wife (as a wife) is not an ancestor. Now, if we can trace the feud presumptively to the purchaser's paternal grandfather, Philip Brown, and suppose *his* paternal line exhausted, then Philip Brown must be supposed to have had the feud from *his mother*, Margaret Pain, and not from *his wife*, Esther Pitt; since the presumption will be that *he also* had taken it by descent; and, consequently, the brother of his mother, or the Class, No. 10, must be entitled to the inheritance.

As,

As, therefore, the law gives the preference to the heirs of the male rather than to those of the female, and to the heirs of the mother rather than to those of the wife; if the feud can be traced presumptively to the paternal grandfather, must not *his* mother's heirs be first entitled, if those of his father are no longer to be found? If we prefer the blood of the grandmother to that of the great-grandmother, do not we contradict the very axioms we set out with? Do not we give the preference to the grandmother rather than to the grandfather? To the wife than to the husband? To the female than to the male? Can we be said to prefer the grandfather, when we shut out *his* maternal heirs from the succession? If a person's blood be composed of that of *both* of his ancestors, must not his blood be considered as existing till that of *both* of his ancestors be no more? If the blood of *the mother* (the mother of an ancestor, however remote,) continue, must it not be a continuance of the blood of the son? Can

his

his blood be considered as exhausted, while one-half of it remains? Can we deem it wholly extinct when one-half is not taken into consideration (c)?

From what has been advanced, therefore, it should seem to follow inevitably that the brother of the paternal great-grandmother ought to be preferred, in the succession, to the brother of the paternal grandmother. But, before the subject be dismissed, it may be proper to consider more particularly what has been urged in favour of the contrary position.

And, in the first place, it is observable that it is not noticed by *Plowden* that Mr. Justice *Manwoode* cited any authority in support of what he advanced: nor is either of the other Justices noticed as having cited any: nor does the reporter himself, either in the case or the subjoined note, refer to any authority: neither does *Lord*

(c) *Watk. N. XVII. to Gilb. Ten. 19. e. p. 336, &c.*

Bacon:

Bacon: neither does *Sir Matthew Hale*: neither does the *Chief Baron Gilbert* cite any.

The author of the *Remarks*, indeed, says (*d*) that the *Yearbook, Mich. 12 Ed. IV. 12.* (*e*) might be justly cited in support of his own system: "For the question," says he, "between *Manwoode* and Mr. Justice *Blackstone* is this, When all the representatives of the male stock of the paternal line are extinct, who shall succeed? The former says the heir of the *Ailes*; the latter the heir of the *Besailes*; but, what is most singular, to support his (Mr. Justice *Blackstone's*) argument, an authority is brought which, upon the same question, gives the succession to the *Ailes*: "The heir of the son, on the part of the *Ailes*, ought to inherit."

Now it should be observed, that there is not one word in this case in the *Year-*

(*d*) *First Pamphlet*, 39.

(*e*) *Fol. 14. a.*

book,

book (f), which says that the heir of the *Ailes* should exclude the heir of the *Besailes*; but only that the heir of the *Ailes* should take, and not the heir of the mother; which is not disputed. Could the issue have been supposed to have left an heir on the part of the *Besailes*, no intimation is given in the case that such heir should not have succeeded in preference to the heir on the part of the *Ailes*. This case, therefore, does not appear to be a case which might be justly cited in support of the position that the brother of the

(f) *Nota q. fuit ten. p. tous les Justic. de Comen Bank, q. lou home p.chas. terre & devy sans issue & sans heir de pt. le pere, q. son prochain heir de pt. le mere ava. le terr. & si hoe. p.chase. tr. & ad issue & devy, l'issue ent. & devy sans issue, & sans heir de pt. s. pier. s. de pt. aile s. pere, q. en cest case l'heir de pt. le mer. s. pere. s. de pt. son aielles doit enherit, car cesty q. doit enherit. al pere doit enheriter al fits.—Fuit [auxy.] ten. si home purch. terr. & ad issue, q. ad le terr. per disc. & puis l'issue devy sans issue & sans heir de part le pere, q. l'heir de pt. le mere le fits ne doit enheriter, car il n'est de sank cestuy en q. l'original possess. commence. s. il n'est de sank le pere, &c. mes l'heir le fits de part l'aielles, s. de part le mere son pere doit enherit, &c.*

paternal

paternal *Aunts* ought to be preferred to the brother of the paternal *Berules*.

Seeing then that there is no authority referred to which can establish the contrariety, it remains only to examine into the reasons alleged in its support.

Mr. Justice *Manwode* says (g) that the brother or sister of the purchaser's paternal grandmother shall be preferred before the brother or sister of the purchaser's paternal great-grandmother, BECAUSE *they are equally worthy in blood* (for such heirs come from the blood of the female sex, from which the purchaser's father issued); and, *where they are all equally worthy, the next of blood shall always be preferred as heir.*

And *Plowden*, in his note, when speaking of his putting the question to *Manwode*, in the presence of *Harper, J.* assert the reason to be—"Because the forme

(g) *Plowd.* 450.

i. e. th

(i. e. the brother of the paternal grandmother) is nearer in blood to the purchaser on the part of his father; which proximity holds place on the part of females conjoined by marriage to males, where such blood is once derived by a male to the first purchaser."

Lord Bacon (*h*) says, If a man purchase land in fee-simple, and die without issue, in the first degree the law respecteth dignity of sex and not proximity; and, therefore, the remote heir, on the part of the father, shall have it before the near heir on the part of the mother; but, in any degree paramount the first, the law respecteth not [What? (*i*)], and, therefore, the near heir by the grandmother, on the part of the father, shall have it before the

(*h*) *Elements*, I. p. 3. *Tracts*, 37. edit. 1737.

(*i*) If dignity of sex, the position is indisputably erroneous; and if dignity of blood, then there must be dignity of blood to respect; and, consequently, there must be an inequality of dignity; and, if there be an inequality of dignity, the rule of proximity cannot apply; as it can only apply where the dignity is equal.

remote

remote heir of the grandfather, on the part of the father.

Lord *Hale*, though he acknowledged that the brother of the father's grandmother and the brother of the father's great-grandmother, are of the blood of the father; and that the great-grandmother's blood has passed through more males of the father's blood than the grandmother's, yet says (*k*), The father's mother's sister shall be preferred before the father's grandmother's, or the purchaser's great-grandmother's, brother, BECAUSE they are all *Cognati*, and not *Agnati*; and the father's mother's sister is the *nearest*; and, *therefore*, shall have the preference.

Chief Baron Gilbert, after noticing the preference given to the paternal line, says (*l*), " If the father's male line failed, it (the feud) went to the female blood of the father; for the Lords were presumed

(*k*) *Com. Law*, 271—2

(*l*) *Ten.* 19.

rather to respect the female blood of their former tenants than the blood of the mother, who was newly introduced into the family of such their feudary: Because the feud was given *as an ancient one*: and, by consequence, the blood of the precedent tenant was preferred to any other. But the blood of the father's mother was preferred to the blood of his grandmother, being both female bloods; and both coming under the consideration of ancient tenants, the nearer tenant's blood was preferred to the more remote."

In short, the rule assumed appears to be this, "Where the dignity is equal, there the proximity shall prevail." And, consequently, the first thing to be inquired into is, Whether, in the present case, the dignity of the blood of the paternal grandmother and that of the paternal great-grandmother, *be absolutely equal*?

The brother of the paternal grandmother
and the brother of the paternal great-
O grandmother

grandmother claim, it is true, as the heir of a female; and, *so far*, they may be considered as equal in dignity; but the former, in making out his title to the first purchaser, can only claim through Joseph Brown, the father; whereas the latter can claim through Philip Brown also: he, therefore, derives his title through more males of the paternal line (*m*); and, consequently, should seem the more worthy.

And, as the equality of dignity may be thus questioned, so the proximity itself may be doubted as applicable to the present case. For, though the son be the first purchaser, yet he takes his feud *ut antiquum*; and, consequently, as such feud is supposed of indefinite antiquity, and as we can trace it, in presumption, up to his paternal grandfather, we must prove that his paternal grandfather's blood be exhausted, before we can have recourse to any other blood; and, consequently, ac-

(*m*) See *Plowd.* 451 Note *Hales' Com. Law.* 271—2. and 2 *Bl. Comm.* 238—9.

according to principles already noticed, and acknowledged by Lord *Hale*, Lord *Coke*, &c. as the paternal grandfather was composed of *two* bloods—those of his father and his mother; and, as his *father's* is extinct, his heir (and, by consequence, the heir of the grandson) must remain in the blood of *his* (the grandfather's) *mother*; as one of his bloods is exhausted, and the other *not* exhausted: and if the other be *not* exhausted, his blood cannot be extinct; and if his blood be *not* extinct, in that other blood must his heir be found; and, consequently, the brother of the paternal grandfather's mother must be *nearer* to the paternal grandfather, at least, than the brother of a woman whose blood (as such) could possibly form no part of his. And it can be no answer to this mode of argument to say that the grandson was *seised* (*n*), since, though it is admitted that the grandson took as first purchaser, yet he took the feud as a feud OF INDEFINITE ANTIQUITY;

(*n*) See *Hale's Com. Law*, 269.

and, consequently, as a feud which is *presumed* to have descended from the father and grandfather, and, consequently, which must be considered as having actually descended from them, while any of their blood (and their *mothers*, respectively, *were* of their blood (*o*)—), be remaining; for otherwise there is no meaning in the terms.

And as to the reasoning of the *Lord Chief Baron Gilbert*, it does not appear satisfactory: For if the lords were presumed to respect the female blood of their former tenants, rather than the blood of the mother who was newly introduced into the family of their feudary, and the blood of the precedent tenant was preferred to any other, it should seem to follow that the more remote tenant's blood should have been preferred to the nearer, rather than that the nearer should have been preferred to the more remote.

(o) See *Hale*, 271—2. *Co. Litt.* 12. a. and b. &c.

And

And as to *Lord Bacon's* doctrine, it seems equally unsatisfactory, and, by far, more unintelligible. And when it is considered that the author of *the Remarks* (*p*) observes, that one at least of the positions of his Lordship "is totally repugnant to the spirit of those laws whence the doctrine of descent originates," and that "it has been contradicted by every writer on the subject, and is, therefore, inadmissible," any further observation on the passage cited would surely be deemed unnecessary.

But, even granting that the blood of the paternal grandmother and the blood of the paternal great-grandmother are equal in dignity, and that the proximity is in favour of the former, yet the application of the rule—"That where the dignity is equal, the proximity shall prevail"—may be, at least, questionable in the present instance.

Now it is acknowledged by the author

(*p*) *First Pamphlet*, 31. 33.

of the *Remarks* (q), that proximity can only prevail where the dignity is equal: and he cites from Mr. Justice *Blackstone*(r), that "the object of the common-law is proximity merely: *not indeed AN ABSOLUTE PROXIMITY, but a PROXIMITY SUB MODO.*" And he goes on with saying, "On these two principles, *dignity of blood* and *proximity of blood*, do the laws of inheritance depend. *The FIRST of them* IS ABSOLUTE, and operates on ALL occasions; *the SECOND admits of SOME MODIFICATION*, whereby it differs from the strict idea of proximity." For, "in some instances," says he, "the term by legal construction is used in a sense different from its common acceptation: for a term of science," he adds, "is not to be taken in its absolute sense, but as modified by the science which adopts it."

If then the proximity which is the object of the law be not an absolute proxi-

(q) *First Pamphlet*, 30.

(r) *Ibid.* 11—12.

mity, but a proximity *SUB MODO*; if that proximity will admit of *ANY modification*; ought not the rule of proximity to be so *modified* as to render it compatible with the existence of axioms which have been never denied? Or ought we to sacrifice to this rule, rules which were never questioned, or deductions which seem inevitably and indisputably to flow from those rules? If the brother of the paternal grandmother is to be preferred to the brother of the paternal great-grandmother, merely in compliance with this rule of proximity, what is to become of the rules—That the preference is due to the paternal line—That a *feudum novum* is to be held *ut antiquum*—That a person's blood is composed of that of *both* of his ancestors? And what is to become of that principle of common-sense which teaches us that *The WHOLE CANNOT BE EXHAUSTED WHILE ONE-HALF OF IT REMAINS?*

[131]

CHAP. IV.

OF THE ENTRY OF A POSTHUMOUS HEIR.

Abeysance.

Tenant of
the freehold.Infant *in ven-*
*tre sa mere.*Entry of the
then-born
heir.Entry on him
by the infant.

BY the feudal law the freehold could not be vacant, or, as it was termed, *in abeyance*: there must have been a tenant who was capable of fulfilling the feudal duties, and against whom the right of others might be maintained. An infant *in ventre sa mere* was not, on these occasions, considered as *in esse*, and, consequently, could not be considered as a tenant. On the devolution, therefore, of an estate, the *then-born* person who was, at such devolution, entitled, (as, for instance, the brother of the deceased,) was permitted to succeed: and though the issue, while *in ventre sa mere*, was not regarded as *in esse*, yet (when afterwards born) as it was the person whom the law would have pointed out to enjoy the inheritance of his father, had it been *in esse* when

when he died; and as the reason for the entry of the uncle had now ceased, since the issue became capable of holding the hereditaments descended, and of fulfilling those duties by his guardian, such issue was permitted to enter upon the uncle, and to enjoy the estate. [132] Guardian.

But though the law respecting the subject of this chapter, since the time of the statute 10 & 11 WILL. 3. c. 16. does not appear sufficiently clear and determined, yet it certainly is confined within very narrow limits, when compared with the law as it stood *before* the passing of that act. Several nice distinctions then existed, which are now, as to this point, apparently done away. However, they seemed to have been founded upon principles which cannot be shaken, without shaking the whole law. Those principles exist, though their application to these cases, and their consequences with respect to them, may, perhaps, be now no more. Those principles, and the deductions which may yet be

Stat. of Will.
III.

[133]

be drawn from them, still deserve our attention, and may be considered as extending to certain points and purposes to which that statute does not reach. And as the particular points to which that statute *does* extend are by no means, I think, satisfactorily determined, it may not be improper to consider the ancient as well as the modern law as to this head.

When the after-born nearer heir might have entered.

When, therefore, a person succeeded to an estate by DESCENT, OR PER FORMAM DONI, such estate *should* have been divested by the subsequent birth and entry of a nearer heir; but if the person who so succeeded had claimed *by* PURCHASE (a), an after-born nearer heir could *not* have divested it. So in the case of a remainder or reversion expectant upon an estate-tail, the after-born issue might have entered and divested THE POSSESSION of the reversioner or remainder-man, but could not

(a) Or entered on condition broken, or on fulfilling such condition. *Sed Quare.* and *vide Pasch.* 9 Hen. 7. pl. 11. fol. 25. a. 1 Co. 95. a. 99. b. Cro. Car. 87. Kirton's case. And *post*, 173. (a).

have

have affected THE VESTING IN INTEREST of any remainder. So also in case of escheat; if the lord had entered for default of heirs, and a posthumous heir was born, such posthumous heir might have entered, (as he still may enter,) upon the lord, and revived the estate.

But in order to illustrate this matter the more clearly, and to point out the principles on which this doctrine depended, it will be necessary to observe, that he to whom a remainder is limited must take at the time when such remainder ought to vest IN INTEREST. [134]

It is sufficiently established that a remainder must vest during the particular estate, or *eo instanti* that it determine; *i. e.* that no chasm or period can be admitted between the expiration of the particular estate, and the vesting of the remainder (*b*).

When a contingent remainder must vest.

So

(*b*) *Fearne*, 233. *Plowd.* 25. 33. 155. 485. 489.
1 *Co.* 66. b. 8 *Co.* 75. a. 2 *Bla. Comm.* 168. ch. 11.
See

When the
grantee must
take.

So it is equally clear that he who takes a remainder, (*i. e.* at its creation, and not

See *Douglas*, 337. *Hodgson & Ux. v. Ambrose & al.* And the case of *Reeve and Long*, in *Salkeld, Carthew, Levinz*, &c.

And the reason why such a chasm is not permitted is, that the freehold may not be in abeyance. But on a feoffment to uses, before the statute 27 *Hen.* 8. c. 10. the legal estate was vested in the feoffees; and, therefore, as the interest of the *cestuy que use* was not within the reason, it was not within the rule. And so of a trust at this day. 1 *Atk.* 590. *Hopkins al. Dare v. Hopkins.* 1 *Fearne*, 427. 449. *Cas. Temp. Talb.* 151. *Chapman v. Blissett.* And see *Moore*, 720. *pl.* 1006.

But this rule extends to *remainders created by will*, as well as to those created *by deed*; though it cannot extend to an *executory devise*; for an executory devise is *not* a remainder, the very nature of an executory devise requiring that there be no *particular estate*: for if there *be* a particular estate, the limitation over shall be considered *as a remainder*, and *not* as an executory devise. And a limitation shall never be considered as an executory devise, where it can, in any wise, be supported as a remainder. See *Purefoy & Rogers*, 2 *Saund.*

In the case of an executory devise, the freehold shall descend to the heir till the contingency happen. *Lutwich.* 798. *Clarke & Smith.*

That the rule extends to copyholds, See 1 *Walk. Copyh. ch.* 5.

on a mesne grant,) must take at the time of its vesting an interest: thus, one Jobson devised certain lands in tail, remainder to the next of his kin of his name; and, at the time of the devise, the next of his kin was his brother's daughter, who was then married to I. S. The devisor died. The tenant in tail died afterwards without issue. And the question, on a special verdict, was, Whether the daughter should have the land? And it was adjudged, without argument, that she should *not*: "For she was not *then* of the name of the devisor, but of her husband's name. *But if she had been unmarried AT THE TIME OF THE DEVISE AND DEATH OF THE DONOR, although she HAD been married at the time of THE DEATH OF THE TENANT IN TAIL WITHOUT ISSUE, yet she should have had the land (c).*

[135]

And

(c) *Jobson's case*, *Cro. Eliz.* 576. See *Ibid.* 532. *Bon v. Smith*, S. P. And see 1 *Ves.* 335. 359. *Pyot v. Pyot*; and *Powell on Devises*, 347. 3 *Com. Dig.* 37. *Devise*, (N. 21.) 1 *Strange*, 30. *Goodright v. Wright*,

When the
devisee.

[136]

And as the devise is consummated on the death of the devisor, and the estate devised (supposing it not executory or contingent) must vest in interest at such his death in the person to whom given, or not at all; so there must, by the terms, be a person then *in esse* who is capable of taking it, agreeably to the last-cited case. Thus, on a devise to A. in tail, with remainder to B. in tail, with remainder to the right heirs of A. in fee: A. died without issue, living testator: B. after making of the will, had issue C. (who was also heir at law to A.) and died in the life-time of the testator also: and it was resolved, that C. could *not* claim, either as the issue of B. nor as heir to A. as both died in the

Wright. 1 *Ves.* 114. N. *Ellison v. Airey.* 2 *Ves.* 210. *Lord Teynham v. Webb.* 10 *Mod.* (*Lucas*) 376. *Goodright v. Wright.* 1 *Vent.* 229. See *Cro. Car.* 410—13. *Reeve & Malster*; and *Robins. on Gavelk.* Appendix. *Cro. Eliz.* 334—5. *Dyer*, 129. *pl.* 63. *Bonvill v. Payne.* *Hobart*, 33. And 30 *Ass.* 47. 30 *Ed.* 3. f. 27. cited there. *Brooke, Descent*, 24. *Done*, 21. *Co. Litt.* 10. b. and note (2). 8 *Co.* 75. a. *Lord Stafford's case.*

testator's

testator's life-time; but that the *testator's* heir at law should have the land (*d*).

So, when a remainder was contingent, as being limited to an uncertain person, and afterwards vested in any one answering the description required at the time it ought to have vested in interest, in them it should have remained; and could not have been afterwards divested: as if lands were given to A. for life, with remainder to the heirs of B. and on the death of B. his daughter was heir, his wife being *enseint* with a son: in this case, immediately on the death of B. the remainder vested in interest in the person who was *then* his heir; and as B. took no estate himself, his heir took the remainder

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BY PURCHASE: the remainder, therefore, vesting by *purchase* in the daughter, the after-born son could *not* have de-

An after-born nearer heir could not have entered on a purchaser.

(*d*) See 10 *Mod.* (*Lucas*) 370. *Goodright v. Wright*. *Plowd.* 341. *Brett v. Rigden*; and the books referred to in the margin of the English edition. 3 *Com. Dig.* 16. *Devise*, (K.) 1 *Co.* 105. b. *Touchst.* 414. 452. (N. 2.) *Dougl.* 337. *Hodgson v. Ambrose*.

vested

vested it (e). For as a contingent remainder must vest during the particular estate, or *eo instanti* that it determines, it must at that time vest in such person who is *then* capable of taking it, or not at all; and when it once so vested in any, in them should it have remained, and could not have been afterwards divested: so here it must have vested, on B.'s death, in his daughter, who was *at that time* his heir; and, consequently, should the posthumous son have been permitted to divest it, the divesting of it could not have been till *after* the period described; and, therefore,

[138] should not have been permitted at all: for

(e) See 1 *Strange*, 30. *Goodright v. Wright*. *Kitch.* 108. b. *Brooke, Descent*, 2. 24. 58. *Entre Cong.* 92. 1 *Co.* 95. a. 137. b. 3 *Co.* 61. a. *Plowd.* 51. 56. 485. 489. *Hob.* 31, and 33. *Counden & Clerke.* 3 *Com. Dig.* 51. *Descent*, (C. 2.) *Dyer*, 129. *pl.* 63. *Bonvill v. Payne*. *Cro. Eliz.* 334—5. *Frederick v. Frederick*. 1 *Ves.* 85—6. *Miller v. Turner*. *Dougl.* 499. and note (1). *Doe v. Fonnereau*. 2 *Lev.* 408. And 1 *Salk.* 228. second resolution in the case of *Reeve and Long*.

Nor should he have divested an estate to which a person had been *remitted*. See *Co. Litt.* 357. a. 3 *Leon.* 2. ca. 5. 1 *Anders.* 31. ca. 76.

so soon as B. died, so soon had he an heir; and so soon as he had an heir, (for he could not have had one *before* his death, since *nemo est hæres viventis*,) so soon did it become vested; and so soon as it became vested, so soon was it immutably fixed in such heir.

When a daughter, therefore, took BY PURCHASE, as being *the-then* heir of her father or of the person described, a posthumous son was *not* permitted to divest the lands; but when she took as heir BY DESCENT, OR PER FORMAM DONI, such after-born son *should* have divested the estate (*f*). And in *this* point lay the dis-

But he might have entered on a person taking by descent, or *per formam doni*.

(*f*) *Brooke, Descent*, 24. and 58. *Kitch.* 108—9. *Doct. and Stud. Dial.* 1. ch. 7. See *Plowd.* 56. b. *Co. Litt.* 11. b. 2 *Bla. Comm.* 208. ch. 14. *Dyer*, 373—4. *pl.* 15. *Hob.* 31. *Counden & Clerke*.

If she recovered in value, before the birth of the son, by reason of the warranty of the ancestor, the son might have entered on her, for she recovered *as heir*. *Plowd. Quæries, Qu.* 113.

So also of lands in Borough English, a posthumous son shall enter on his elder brother. See *Robins. Gavelk. Appendix*, 14.

P

tion:

inction: though this distinction *seems* now no more (g).

[139]

The posthumous issue might have entered on the reversioner.

Again, a nearly-similar distinction seems to have existed with regard to the right of entry of a posthumous son on the reversioner or remainder-man, in case of their having possessed themselves of the estate on failure of issue living at the death of the tenant in tail whom the posthumous son claimed to succeed to in the inheritance: As if an estate was given to A. in tail, and A. died without issue born at his death, but leaving his wife *enseint* with a son who was afterwards born; on A's death, as there was *then* no issue of his body *in esse*, the reversioner might have entered; but the after-born son might again have entered on such reversioner, and revived the entail; so that his enjoyment of the land should be considered as a continuance of the estate so given in tail: and, consequently,

(g) See the *Stat.* 10 & 11 *Will.* 3. c. 16. And
 1 *Vesey*, 85—6. *Miller v. Turner.* 2 *Ves.* 230. *Robinson v. Robinson.* 1 *Durnford & East*, 633—4.
Roe v. Quartley.

if

if A. had made any leases which he might have lawfully made, they would, when the reversioner entered, and during his possession, have been void as to him; yet, on the birth of such posthumous son, as the estate tail revived, they would have revived also, and bound such son and his issue as tenants in tail (*h*).—And such is [140] the present law.

And analogous to this seems the case of a base-fee: As to I. S. in fee so long as A. B. have issue of his body: and A. B. die without issue born, but leaving his wife *enseint*: it should seem that, on the issue being actually born, I. S. might enter on the person entitled in reverter, for the same reasons as before noticed with respect to the reversion on an estate-tail. The contrary, indeed, was affirmed by *Fenner, J. (i)*, from 17 *Ed. III.*; but what was affirmed by *Fenner* was denied

(*h*) 7 *Co.* 8, 9. *Co. Litt.* 46. a. 2 *Anders.* 9, 10. *pl.* 6. See 1 *Strange*, 349, and 351.

(*i*) 1 *Leon.* 74.

as law by *Rhodes* and *Anderson*, Justices. I cannot find the case cited by *Fenner* reported in the Year-book, but I presume the principle on which it went was, that a condition once broken cannot be revived. Yet even such position, as to this point at least, seems questionable (*k*). And, however the law might formerly have been taken, there can be, I conceive, but little doubt that the child *in ventre sa mere* would now be considered as so far, at least, in existence at the decease of A. B. as to preclude the person claiming from averring that A. B. *died without issue*.

Or on the
lord in case
of escheat.

So, also, when the lord entered in case of escheat for default of heirs of the tenant, an after-born heir might have entered, as he still may enter, upon such lord; in the same manner as the posthumous issue of tenant in tail might have entered on the reversioner (*l*).

(*k*) *Vide Pasch. 9 Hen. 7. pl. 11. fol. 25. a. And ante, 133. N. (a.)*

(*l*) See 1 *Strange*, 349. *Thornby v. Fleetwood. Dyer*, 94. *pl. 33*, and 34. *Chafyn and Lord Sturton. 3 Inst. 231. 1 Co. 98. b.*

Again;

Again; with respect to remainders: If a remainder had been so limited as to have vested IN INTEREST on such an event, the person who was entitled at the time it should so have vested should have held it against a posthumous issue, who should not have been permitted to have divested such remainder (m). But if a remainder once became vested in interest, THE POSSESSION might again have been divested by such posthumous person, as well as the estate in possession of the reversioner: As if lands were given to A. in tail, with remainder to B. in fee; and A. died without issue, (but leaving his wife *enseint*,) on which B. had entered: the issue afterwards born might have entered on B. and revived the estate (n). For the rule that a remainder must vest during the particular estate, or *eo instanti* that it determines, was already satisfied; since such rule relates only to its vesting in interest. And the position, that when a

But not on the remainder-man who took by purchase.

Aliter of him who took a remainder by descent.

[141]

(m) See *ante*, p. 136.

(n) See *Co. Litt.* 281. a.

remainder is once vested it shall not be afterwards divested, was confined to its vesting in interest also. As the estate in interest, therefore, is not divested, or at all affected, by the entry of such posthumous son, any more than it would be by the entry of the issue born during the particular estate, there is no reason why the enjoyment of the possession should not be ruled by the same circumstances, since the principles of each are the same.

Statute of
Will. III.

[142]

Such then appears to have been the law as to these subjects before the statute of 10 & 11 WILL. 3. c. 16.; and we may observe, that where the posthumous issue might have entered at common-law they are still entitled to enter; as the law, where altered, has been altered for their benefit, and not for their disadvantage. And it is now laid down, apparently as a fixed principle, that a child *in ventre sa mere* shall be considered as absolutely born (o).

The

(o) 1 Ves. 85—6. *Miller v. Turner*. And 1 *Durnf. & East*. 633—4. *Roe v. Quartley*.

And

The statute of 10 & 11 WILL. 3. c. 16. has expressly provided for certain cases with respect to remainders; and the light in which that statute has been taken is very favourable to the posthumous issue; inasmuch that the distinction mentioned between a remainder's being vested or not vested in interest, before the birth of such issue, seems now, if not absolutely, yet certainly in a very great degree, to be done away: such child being considered as existing, and the remainder allowed to vest in him in his mother's womb (*p*).

But with respect to the statute of *Will. 3.* we may observe, that it seems to be in favour of such posthumous children only who *take* by way of remainder, and has

And see also the case of *Clarke v. Blake.* 2 *Bro. Ch. Ca.* 320. and 2 *Ves. Jun.* 673. and *Bassett v. Bassett.* 3 *Atk.* 203. and that of *Doe d. Lancashire v. Lancashire.* 5 *Durnf. & East.* 49. and *Doe d. Clark v. Clark.* 2 *Hen. Blackst.* 399. and *Bosanq. & Puller.* 243. *Whitelock v. Heddon.* And 4 *Ves. Jun.* 227. *Thelluson v. Woodford.*

(*p*) See 2 *Bla. Comm.* 169. ch. 11. *Co. Litt.* 11. b. note (4); and 298 a. note (3).

nothing to do with any remainders *limited to others* dependant upon their birth. And as it thus seems to relate only to such posthumous children who take *the remainder over*, so it is expressly confined to the limitation of *a remainder*, and has nothing to do with *a descent*. The doctrine, therefore, relative to a posthumous child taking by descent, remains as at common-law.

With respect, however, to remainders limited to such posthumous issue, the same doctrine applies, whether such remainders be created by deed or by will (*q*).

Posthumous
issue entering
on the person
taking a con-
tingent or
executory
fee.

[143]

If an estate be devised to A. in fee, and, if he die without leaving issue, then to B. in fee; and A. die without issue, but leaving his wife *enseint*, and B. enter; it is conceived that the posthumous issue of A. may enter on B. and take the anterior fee. And this, it is apprehended, would have been the case even *before* the statute of

(*q*) See *Butl. N.* (3), to *Co. Litt.* 298. a.

WILL. 3. (r). For though a fee thus limited after a fee cannot properly be said to be *vested* during the existence of the first (s), “yet it is carrying it too far, perhaps, to say, that it is *not vested at all* (t);” and we have seen that it is certainly fixed, as to the interest or property, in the person to whom limited, in, at least, a qualified or secondary sense; as to be transmissible, &c. (u). And as there is a capacity in the latter fee to become vested in possession, should the anterior one happen to determine, (which is the chief characteristic of a *vested* REMAINDER (x) —), it seems to follow, from the principles al-

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(r) See 1 *Ves.* 85—6. *Miller v. Turner.* 2 *Ves.* 230. *Robinson v. Robinson.* 1 *Durnf. & East*, 634. *Roe v. Quartley.* 1 *P. Wms.* 486—7. *Burdett v. Hopegood.* See 1 *Leon.* 74. case 101. and cited in *Preston on Estates*, 21.; and case of *Buckworth and Thirkwell*, in *Collect. Jurid.* vol. i. p. 332. [and 3 *Bos. & Pull.* 652.]

(s) 1 *Fearne on Conting. Rem.* 341. (4th edit.) 160. (3d edit.) *Lord Raym.* 203. *Luddington v. Kime.*

(t) See *ante*, ch. 1. s. 1. p. 5. and note (g).

(u) See *ante*, ch. 1. s. 1. p. 5.; ch. 3. s. 2. p. 122.

(x) 1 *Fearne*, 328. (4th edit.) 148. (3d edit.)

ready

ready noticed, that it was *so far* fixed in B. before the happening of the contingency, (of A.'s death without issue,) as to have its possession devestable by the posthumous issue of A. in like manner as the *possession* of the remainder vested in interest before that occurrence is suffered to be divested (*y*). And as the fixture of such an interest is antecedent to such contingent event, the enjoyment of such executory fee shall be ruled by it. And as to the difference with respect to the remainder and executory devise, as that the possession only of the first should be affected by the birth of a posthumous person, and, of the latter, that not only the possession, but the interest also, shall be divested, it is easily accounted for from the essential difference in the nature of each estate.

If A. had made a feoffment, before the statute, to the uses of his will, and declared his will to have been, that his daughter

(*y*) See *ante*, p. 140.

(he

(he having no son) should have the lands; and died; and after his death a son had been born, the feoffees should have enfeoffed the son (z).

As to *bastard eigne* and *mulier puisné*, Bastard and mulier. we may observe, that in order to bar the mulier and his issue, there must not only [145] be a dying seised (either by a natural or civil death, and that of lands in *fee-simple*) by the bastard, but also a descent cast; and, consequently, where these two requisites do not concur, the mulier or his issue may enter: and, therefore, if the bastard die seised without issue, and the lord enter by escheat, the mulier is *not* barred: there being no descent (a). But if the bastard had entered, and the mulier died without issue but leaving his wife *enseint*, and then the bastard had issue and died seised, after whose death the posthumous issue of the mulier was born, his right was barred, and he was not permitted

(z) See *Fitzh. Abr. Subpœna*, 23.

(a) *Vide. Mich.* 37 Hen. VI. *pl.* 1.

to enter; as there were both a dying seised and a descent; and, consequently, the right of the bastard established. But had the *bastard* died seised without issue, but leaving *his* wife *enseint*, and then the mulier had entered, and afterwards the son of the bastard had been born, such son could *not* have entered on the mulier, he not being barred; there being no descent cast when the mulier entered. For though the law gave the estate to the issue of the bastard when both these requisites concurred, as a punishment for the mulier's negligence, &c. yet when both these requisites did *not* concur, the issue of the bastard had no title at all (b).

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Upon the whole, therefore, we may conclude, that wherever the posthumous

(b) See *Co. Litt.* 244. a. and 248. b. 8 *Co.* 101. a. and b. *Gilb. Ten.* 27. *Brooke, Descent*, 41. 2 *Bla. Comm.* 248. c. 15. *Plowd.* 57. a. 372. a. And *quære*, as to the law at this day, with respect to the posthumous issue; for if the liberality of the times should consider such issue *as born*, it would perhaps deem it a sufficient *descent*.

issue

issue might have entered at common-law, such issue may still enter; and that the alterations which have taken place, have taken place in their favour.

As to the intermediate profits from the death of the ancestor to the birth of a posthumous heir, it seems that such heir is *not* entitled to them; but that they shall be enjoyed by the person seised of the estate for the time being, to his own use: as if the uncle enters on the death of the father, and afterwards a son be born, the uncle shall be entitled to the profits from the father's death to the birth of the son (c).

Mesne profits.

(c) See *Co. Litt.* 11. b. note (4).

“ *Babington.* Si home ad issue file & devie s. feme enseint la file poit loialm. ent. & si ele devie s. heire poit entre & prende le p.fits pur le temps; & puis si la feme ensient p. l'aunc. p.amont. est delivere du: fitz, son fits poet entre non obstante q. l'heire de son soer est eins p. desc. mez il naver. acc. d'accompt. ne nul [autre] remedié pur les issues en le mesne temps devaunt le nestr. pur. c. q. lour. ent. fuit cog. tanq. il fuit nee.” *Trin. 9 Hen. VI. fol. 25. a.*

And

And when we consider that the daughter and her heir were justly entitled to the freehold *till* the son was born, it seems to follow of necessity that they were justly entitled also to the profits, to enable them to discharge the services of the lands. While they were in the possession of the feud they were certainly subject to the services; and the person discharging the services by right was, as certainly, entitled to the profits. See *Gilb. Ten.* 45—6. and 3 *Blackst. Comm.* 187—8. ch. 10. 3 *Atk.* 203. *Bassett v. Bassett*, and *Watk. on the King's claim as Guardian of the Duchy of Cornwall.*

CHAP. V.

[147]

OF DESCENTS *EX PARTE MATERNA*; AND
WHAT SHALL CHANGE SUCH DESCENT,
AND GIVE THE PREFERENCE TO THE
PATERNAL LINE.

IF a person succeeds to an estate *as HEIR* Descent *ex parte materna*.
to his mother and dies without issue, his
heirs on the part of his mother shall inhe-
rit such estate, and not his heirs on the
part of his father : and, *e converso*, if it
descends from his father, it shall devolve,
on the death of the son, to his heirs of the
paternal line (a).

But if a person takes an estate *BY PUR-* Purchaser
takes *ut anti-*
quum.
CHASE, he takes it *ut feudum antiquum*;
and, consequently, it shall descend to his
heirs *on the part* OF HIS FATHER, as of

(a) See *ante*, ch. 2. p. 89. *Litt. s. 4.* 2 *Bla. Comm.*
c. 14. p. 222, and 234.

the

Paternal line
preferred.

[148]

the worthiest blood; the law never calling in the heirs on the part of the mother to the inheritance of the son, unless such inheritance had actually descended from the mother, or until the blood of the father be exhausted. And when the son takes BY PURCHASE, it could not possibly (by the terms) have *actually* descended to him from the mother, or from any one else; but as he takes it UT ANTIQUUM, the *supposed* or *presumed* descent is from the father, to whose line the preference in law is given; and, therefore, as it has been said, the estate acquired by the son *as a purchaser* shall descend to his heirs on the part of his father (b).

For should a son take an estate by purchase, and it be expressly limited to him and his heirs of the part of his mother, yet his heirs of the part of his father shall succeed to the estate: for it is not in the power of an individual (nor even of the

(b) *Litt. s. 4. Co. Litt. 12.*; and see *ante*, ch. 2. note (a), and art. vii.

king

king (c)—) to institute a new kind of inheritance not allowed by the law (d).

Supposing

(c) *Bro. Patentes & Grantes le Roy*, 104. *Hob.* 224. 1 *Co.* 43. b. Lord Lovel's case, cited; and next note (d).

(d) *Co. Litt.* 13. a. 27. a. *Plowd.* 251. 335. 7 *Co.* 40. b. Beresford's case. 1 *Brownl.* 45. 2 *Ibid.* 334. 2 *J. Blackst. Rep.* 1229. *Roe d. Aistrop v. Aistrop.*

So if lands descend differently from the course of the common-law, as in Borough English, for instance, the person seised of such lands cannot alter the descent: as if one seised in Borough English make a feoffment to the use of himself and the heirs male of his body, "according to the course of the common-law;" the words, "according to the course of the common-law," are void; and the youngest, and not the eldest son, shall take the entail. *Dyer*, 179. *pl.* 45. *Jenk. Cent* 220. *pl.* 70. S. C.; and see further, Of Gavelkind and Borough English, *Robins. on Gavelk.* b. 1. c. 5. p. 52. 65. 74. c. 6. p. 94—5. and 2 *Bl. Rep.* 1228. *Roe d. Aistrop v. Aistrop.*

But if A REMAINDER be *limited* of lands in Borough English or gavelkind "to the right heirs" of a particular person, the *eldest son* shall take, For such customs are that lands shall DESCEND to all the sons, or to the youngest of them; and *have nothing to do with a PURCHASE*, which such remainder evidently is: and, consequently, being without the custom, it is the province of THE COMMON-LAW to point out the person who shall now take as heir. See *Bro.*

Of a remainder in gavelkind, &c.

Desc.

[149] Supposing then an estate descending *ex parte materna*, we will inquire what will be

Desc. 59. *Done*, 42. *Co. Litt.* 10. a. *Hob.* 31. 1 *Co.* 101. a. 103. a. and see *Robins. on Gavelk.* b. 1. c. 6. p. 117.; and 1 *Atkins*, 607. *Roberts v. Dixwell*; and *Preced. in Chanc.* 464. *Brown v. Barkham.* *Davy's Rep.* 31. a. *Kitch.* 86. a.

And when the law *ascertains* who shall take a remainder, we must be careful to recollect that it is taken BY PURCHASE. For though this is in itself so evident, yet we may, perhaps, from want of sufficient attention, be led to suppose that if there are more than one who are heirs at law to the person described, they shall take such remainder as they would have succeeded to an inheritance: for, notwithstanding we must thus have recourse to *the law of DESCENTS* to ascertain the persons who are to take, yet, *when they are once ascertained*, we have nothing further to do with it; for the persons then take AS PURCHASERS. And, therefore, if a remainder be limited to the right heirs of A. and A. die during the particular estate, leaving several sons; as the law declares the *eldest only* to be his heir, the eldest only shall take such remainder. See *Co. Litt.* 220. a. 1 *Co.* 104.; and 1 *Strange*, 42. *Brown v. Barkham.*

But in case A. had died, leaving two daughters, as the law considers them *both* as his heir, they shall *both* take; but as they take *as purchasers*, they shall not have it *in parcenary*, (for to do this they must have taken *by descent*, *Litt.* sec. 254.) but as *joint-tenants*;
or

be sufficient to break such descent, and
 cause the estate to go in future to the heirs

[150]
 What shall
 break the
 descent.

ex

or as tenants in common. See 3 *Leon.* 14. case 32. *Stowell v. Earl of Hartford*; and see also *Hob.* 33. *Counden & Clerke. Brooke, Descent*, 24. and *Done*, 21. *Co. Litt.* 163. b.

So if A. had had three daughters, and the eldest of them had died, leaving several sons; the second leaving two daughters; and the youngest be living; and then the remainder vest: we must inquire who were then (for it matters not who were before, (at his death,) or who might be thereafter. See *ante*, ch. 4. p. 135.; and *Brooke, Done*, 21.) the right heirs of A.? And these we find to have been the eldest son of the eldest daughter, the two daughters of the second, and the youngest daughter herself: these, therefore, should take the remainder, and they should take it in equal portions as joint-tenants. For though had they succeeded as to the inheritance of A. they would have taken *per stirpes*, and not *per capita* (the eldest son one-third part, the two daughters one other third part between them, and the aunt the other third); yet *such* would be the manner in which they would have taken BY DESCENT, and *not that* in which they should take BY PURCHASE: for being then all equally the heirs of A. they all equally answered the description given; and, consequently, all were equally entitled to take; and, where more than one take together, *by purchase*, it must be either in joint-tenancy or common.

And note: In bequests of personal property to "the relations"

[151] *ex parte paterna*.—And, in order to effect this purpose, the estate must be made to fix

relations" or "next of kin," of any one, the statute of distribution furnishes the rule as to the objects of the bequest, *i. e.* ascertains the persons comprehended in those terms; but when they are ascertained, the statute ceases to be a rule: And the persons taking shall take *per capita*, though the act might, in a similar case, order the distribution of the effects of an intestate to be made according to their stocks or roots. See *Cas. Temp. Talb.* 251. *Thomas v. Hole. Prec. Cham.* 401. *Roach v. Hammond.* 1 *Atk.* 470. *Harding v. Glyn.* 1 *Pr. Wms.* 327. anonymous; and see *Mr. Cox's N. (1) to 2 Pr. Wms.* 385. *Blackler v. Webb*, and the books by him cited.

"Issue." 3 *Ves. Jun.* 257. *Davenport v. Hanbury.* And see *post*, (Of persons taking by devise.)

So if a gift be made in tail, or for life, to N. with remainder over to the right heirs of P. and M. their right heirs shall take as joint-tenants or as tenants in common. *Bro. Done*, 21. *Joint-ten.* 12. *Formedone*, 30. See *F. N. B.* 219. *B. Co. Litt.* 188. a. 1 *Fearne*, 460.

When, therefore, a remainder is limited to the right heirs of any one, (who takes no estate himself,) the words "the heirs" are only as a *descriptio persone*; and, consequently, the person taking must answer such description. If it be limited of lands in *Gavelkind* or *Borough English*, "to the right heirs of A." without any thing farther; the heirs of A. AT
COMMON-

fix in the person taking BY PURCHASE ; [152]
 or, in other terms, the estate *descending*
 must

COMMON-LAW (for we have now nothing to do with the custom) shall take. But if a devise be (*though of lands at common-law*) to "the heirs of A. according to the custom of Borough English," or "of Gavelkind;" this being as a *descriptio personæ*, the person taking must answer it: and the *youngest son*, in the first case, and *all the sons* in the latter, shall take: but still they must take *as purchasers*. See *Preced. in Chanc.* 464. *Brown v. Barkham. Robins. on Gavelk. b. 1. c. 6. p. 117. and Co. Litt. 10. a. note (4).*

And note also a difference between a limitation to "the heirs of A." and to "the next of blood." For the latter limitation has nothing to do with the laws of descent: as the "heir of A." may be one person, and "the next of his blood" another. Next of blood.

Thus where a remainder was limited "*propinquioribus de sanguine puerorum*" of the devisor, who left two sons and a daughter; the sons had no children, but the daughter had two daughters; it was held, that neither the sons nor the daughter should take, for they were *pueri*, and not *propinquioribus de sanguine puerorum*; but that the two daughters of the daughter should take for their lives; and if there had been also sons of sons or daughters, they should *all have taken together*; but that children born after the remainder vested should take nothing. For that the *nearest of degree* in blood should take, and the *worthiest* in order of descent: the words here importing no respect of dignity,

[153] must be DESTROYED or EXTINGUISHED, and the estate which is to descend to the paternal

dignity, but of proximity of blood. 30 Ass. 47. and 30 Ed. 3. 27. *Brooke, Done*, 21. *Descent*, 24. *Hob.* 33. *Co. Litt.* 10. b. and note (2).

So if a remainder be limited to "the next of blood of A." who has two sons, B. and C. and dies: B. has two sons, D. and E. and dies: the eldest son of B. has issue and dies: E. shall take, in exclusion of the issue of D. though such issue is the heir at law to A. *Co. Litt.* 10. *Kitch.* 86. a.

So if A. had had two sons, and the eldest had issue and died; the younger son should have had the remainder, and not the issue of the eldest: for the youngest was nearer of blood to A. than the grandson. *Brooke, Done*, 21.

So if A. had a father and uncle, and died without issue, the father, and not the uncle, should take: for the father is next of blood to the son. *Litt.* s. 3. *Co. Litt.* 10. b. 11. a. note (1); and 3 *Rep.* 40. b.

So if he had had a father and a brother, the father should take: for the father is nearer in proximity than a brother. 1 *Vent.* 414. *Collingwood v. Pace*. 3 *Co.* 40.

So had he a brother of the half-blood, and an uncle of the whole, the brother of the half-blood should take: for he is nearer in degree than the uncle. See 1 *Vent.* 424. *Collingwood v. Pace*; and see also *Show. Cases in Parliam.* 108—10. *Watts & al. v. Croke*; and 2 *Pr. Wms.* 735. *Cowper v. Earl Cowper*.

But

paternal heirs, must be an estate *entirely new*.

But to particularize the several cases in which it has been determined when the heirs shall take by descent, and when by purchase, would be beside the intention of the present work. Nor shall I presume to mark the precise line of distinction through all its meanders,

[154]

Words of
purchase and
of limitation.

“ Hooks, angles, crooks, and involutions wild,”

which separates the “ words of purchase”

But if a remainder DESCENDS, the descent shall be according to the nature of the lands; as if lands in gavelkind or Borough English be limited to A. for life, with remainder to B. in fee; and B. die in the lifetime of A.: here, the remainder vesting in B. his heirs take it, on his death, *by descent*; and *all* the sons, (in the one case,) or the *youngest*, (in the other,) shall succeed to it. It is scarcely necessary to add, that it is the same as to a reversion descending. See *Dyer*, 128. *pl.* 58.; and *Robins. on Gavelk.* b. 1. c. 5. p. 78. and authors referred to by him; and *Co. Litt.* 22. b. 23. a. 3 *Pr. Wms.* 63. *Chester v. Chester*; and see 6 *Viner's Abr.* 194. Copyhold, (C. e.) *pl.* 16. (cites 1 *Freem.* 45. *pl.* 55. Fox & Smith, which see). *Semb. Contra.* But *quære* as to that case.

Descent of a
remainder,
or reversion
in gavelkind.

from “ words of limitation;” (but which, it is remarked, have been very good clients in Westminster-hall (e)—). Yet, in order to enable us more easily to discriminate between these celebrated terms, and ascertain the requisites to fix an estate descending *ex parte materna* in the heir, as a purchaser, I will endeavour to lay down some certain rules or principles (f), which [155] may serve as guides in this pursuit, which is certainly as important, as it frequently is difficult and arduous. And instead of crowding the margin with references to the numerous cases wherein “ words of purchase” and “ words of limitation” have been the objects of discussion, or descending to the minutiae of the subject, I shall content myself with laying down a few such principles, and

(e) 2 *Eunomus*, 41.

(f) LORD MANSFIELD, in the case of *Long v. Laming*, (2 *Burrow*, 1106,) said, “ It is to be lamented that questions of this kind have occasioned so much litigation and expence; *the best way to settle them is to reduce the matter, if possible, to some CERTAIN RULES.*”

citing

citing a few such cases, and then refer to such authors as shall appear to be sufficient to establish what I assert.

First then, *a person shall take BY PURCHASE when he takes an estate which never vested or attached, or might have vested or attached, in the ancestor.*

When a person shall take by purchase.

As if a son *buys* (which is the vulgar acceptation of the term purchase) an estate to him and his heirs (g).

So if a remainder be limited by a stranger to *the RIGHT HEIRS of A.* and A. have no estate in the premises himself: thus, if there be baron and feme, who have issue a son, and lands are letten for life, with remainder over to the heirs of the feme; before which remainder falls, the baron and feme die; the son shall take *AS A PURCHASER*; and if he die without issue, his heirs on the part of the father (or

Heirs general.

[156]

(g) See *Litt.* sec. 4.

baron)

baron) shall inherit, and not those on the part of the mother (or feme)---(h).

Thus when an estate is limited *by a stranger* to the right heirs of a person *who takes no estate himself*, his heir necessarily takes by purchase; as there is nothing in the ancestor, there is nothing to descend.

Heirs special. But if the limitation had been to the **HEIRS SPECIAL** of a person *who took no estate himself*, and in whom such remainder could not even attach, yet, it is said, that the heirs special shall not take absolutely by purchase; but then it is as clear, that they shall not take absolutely by descent. It is indeed a kind of neutral estate, which we scarcely know how to term. Sometimes the person taking this uncouth non-descript is said to take by purchase; at others by descent; then again by neither, but in an intermediate manner

(h) *Co. Litt.* 13. a. and 298. a.

between

between both ; and by Sir *M. Hale* (i) it is called—and called, says Mr. *Fearne* (k), with emphatical accuracy—“ a *quasi* entail.”

But where an estate is limited to, or remains in, the ancestor, and another is limited to his heirs general or special, such estates shall, in many cases, coalesce ; or, at least, the latter be considered as *fixed* in the ancestor ; and the heirs shall be in
BY DESCENT.

[157]

When a person shall take by descent.

As, “ when the ancestor, by any gift or conveyance, takes an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs, in fee or in tail, the words, “ the heirs,” are WORDS OF LIMITATION OF THE ESTATE, AND NOT WORDS OF PURCHASE (l).”

Limitation to the heir fixing in the ancestor ; vide post.

Rule in Shelly's case.

(i) *Hale's MSS.* in *Not.* (6). *Co. Litt.* 14. a.

(k) *Conting. Rem.* v. i. p. 108—113. [82. 5th edit].

(l) Rule in *Shelly's case* ; 1 *Co.* 104. ; and see of this rule, *ante*, ch. 1. s. 1. p. 17. and authors there referred to.

And,

And, in order to illustrate this rule and assist us in determining when such words (the heirs) shall be considered as words of purchase, and when as words of limitation, I shall speak, first, as to the creation of such estates ; and, secondly, as to the estates themselves.

Estates co-
alescing.

And first, as to the creation of such estates :—

[158]

By what
conveyance.

Both estates must be limited by, or derive their existence from, THE SAME conveyance ; or the estate in the ancestor be in him as a portion undisposed of, of the estate moving from him, and by him so limited.

For if an ancestor have an estate for life, and an estate be limited of the same lands to his heirs *by* ANOTHER conveyance, the heirs shall, notwithstanding, take *BY PURCHASE*, and *NOT BY DESCENT* (*m*).

(*m*) See the rule in Shelly's case, before ; and 1 *Lord Raym.* 37. Moore and Parker ; and see *Fearne*, 55. (3d edit.) 95. (4th edit.) [71. 5th edit.]

So

So if it be limited to A. for life, with remainder to the heirs of B., and A. *grant* his estate to B., the estates will *not* coalesce; but the heirs shall be in BY PURCHASE (n).

So where husband and wife were seised of a copyhold to them and the heirs of the husband; the husband, after a surrender to the use of his will, *devised* it to the heirs of the body of the wife, if they should attain to the age of fourteen years: The court agreed, that the devise did *not* operate as a remainder; for although the wife *had* an estate for life, yet this was A NEW DEVISE to take place after her death, and not a remainder joined to her estate (o).

[159]

So where the father *settled* lands on his son for life, retaining the reversion to himself, and afterwards *devised* them to the heirs male of such son; the estates did *not* unite;

(n) See preceding page, note (m).

(o) 1 *Levinz*, 135. *Snow v. Cutler*; and cited in *Fearne*, 55. (3d edit.) vol. i. p. 96. (4th edit.) [72. 5th edit.]

but

but the heirs male took the entail BY PURCHASE^(p).

Power.

But it seems that if lands be limited to A. for life, and, after A.'s decease, *to such uses as B. shall appoint*, and B. appoint to the heirs of A., that these estates *shall* coalesce. For B. being merely an instrument, *when* he appoints the estate the appointee is *in* from the grantor; and the estate so appointed arises, has its existence, and takes effect, from the deed by which such power was created; which, in the case put, was *the same* which limited the estate for life to A. (q).

[160]

And this, though the person executing such power limit it subject to the payment

(p) *Doug.* 487—509. *Doe v. Fonnereau*. But see *ante*, p. 156. See also 2 *Burr.* 873. *Goodman & al. v. Goodright*. *Ca. Temp. Talb.* 262. *Lady Lanesborough v. Fox*.

(q) See *Co. Litt.* 299. b. note (1). (Harg. and Butler's edit.) and *Fearne*, vol. i. p. 99. (4th edit.) [74. 5th edit.] 2 *Atk.* 565, and 568. *Cook v. Duckenfield*; and see 2 *Ves.* 78. *Duke of Marlborough v. Lord Godolphin*.

of

of debts (for if the quality of the estate be not changed, the charging it with incumbrances will not alter the descent, as we shall presently see).

As where a mother settled an estate to herself for life, remainder to trustees for a term of years; remainder to her son for life; remainder to trustees to preserve contingent remainders; remainder to the first and other sons of such son, in tail-male; remainder to the heirs of his body generally; and in default of such issue, to such uses, &c. as she should by deed or will appoint. The mother, by her will, appointed to her said son (who was her heir at law) in fee, subject to debts. The son afterwards died without issue: and he was adjudged to have taken BY DESCENT, *and not by purchase*; and consequently, such estate would descend on his death to his heirs *ex parte materna* (r).

Secondly,

(r) 2 Burr. 879. Hurst and another v. Earl of Winchelsea and others; and Co. Litt. 12. b. note (2).
For

What estates. Secondly, as to the estates themselves:

1st, Both legal, &c. First, *the estates must be BOTH LEGAL, or BOTH EQUITABLE.*

[161] And, therefore, if the estate of the ancestor be legal, and that to his heirs be equitable, or *vice versa*, they cannot coalesce; for being of different natures they cannot make *one* estate (*s*).

As, to the use of trustees during the life of A. upon trust to permit him to take the profits; remainder to the heirs of the body of A.; the estates will not unite;

For a will made in pursuance of a power is to be taken and construed *as a common devise*; and consequently, if the will would give in either case the same estate as the heir would have taken *without* it, he shall be in by *descent*. See 1 Just. *Blackst. Rep.* 187—8.

(*s*) See *Fearne on Conting. Rem.* 34. 81. (3d edit.) 68. 165. vol. i. (4th edit.) [52. 113. 5th edit.] In illustrating this rule, the references are chiefly made to this invaluable work; as most of the cases are there elaborately considered and referred to.

but

but the heirs shall be in BY PURCHASE (t.)

Secondly, They *must be* BOTH FREE-^{adly, Both} HOLD. (See the rule in Shelly's case ^{freehold.} before.)

For if it be limited to the ancestor *for years*, with remainder to B. in tail; remainder to the right heirs of such ancestor; the right heirs shall take BY PURCHASE, when the remainder vests (u).

Thirdly, *The subsequent limitation to the heirs must be confined to those of the ancestor who takes a particular estate.* [162]^{3dly, Estate to the heirs.}

For if it be to feme for life, with remainder to the heirs of the bodies of baron and feme, the heirs of their bodies shall be

(t) *Ibid.* 34. (3d edit.) 68. (4th edit.) [52. Butl. ed.] and see 2 *Durnf. and East*, 444—451. *Silvester v. Wilson*.

(u) *Co. Litt.* 319. b. 1 *Co.* 104. a. *Fearne*, 33. 253. (3d edit.) 65. 482. (4th edit.) vol. i. [50. 330. Butl. ed.] and *post.* p. 165.

R

in

IN BY PURCHASE *and* NOT BY DESCENT;
for the freehold was in the feme alone (x).

This necessarily follows from what has been said: If the remainder be *not* confined to the heirs of the person taking a particular estate, then the remainder is, in some degree, to the heirs of a person *who does NOT take a particular estate*; and consequently not within our assertion: for the rule goes upon the supposition of the ancestor's taking an estate himself. And although one ancestor does (in the case above) take such estate, yet the remainder is not merely to the heirs of such single ancestor, but to the heirs of both; and therefore cannot attach singly in the particular tenant.

[163] *But if the heirs BE confined to those of the*

(x) See 2 *Bla. Rep.* 728. 731, 732; *Frogmorton v. Robinson v. Wharrey*; and see *Fearne*, 29. 46. 83. (3d edit.) and 44. 85. 177. (vol. i. 4th edit.) [37. 65. 120. Butl. ed.] and see *Co. Litt.* 219. 2. note (3); and 2 *Durnf. & East*, 435. in the case of *Denn v. Gillot*.
person

persons taking a particular estate, it matters not whether the estates of the ancestors be several (so they ALL take) or joint; nor whether the remainder over be to the heirs of all, or only of some, or one, of such ancestors.

4thly, To the ancestors.
Joint and several.

As to baron for life, remainder to feme for life, remainder to the heirs of the bodies of baron *and* feme, it seems, though the estate tail is not executed in them because the limitations did not correspond with each other, that yet it *vests in them as a remainder*; (and it is said, that on the death of one, it shall merge the particular estate of the survivor, and then become executed in possession;) and, consequently, the heirs of their bodies shall take by descent (*y*).

To baron *and* feme, and the heirs of the

(*y*) 1 *Fearne*, 41. 43. 81. (4th edit.) [35. 37. 63. Butl. ed.] and see the case of *Webb v. Webb*.
2 *Vern.* 668.

body of *the baron*, is an estate-tail, *executed sub modo* (z.)

[164] So to baron *and* feme for their lives, with remainder to the heirs of *their* bodies; the estate-tail is *executed*, and the heirs are IN BY DESCENT (a).

5thly, Determinable or absolute.

Nor is it of consequence whether the estate to the ancestor be such as may possibly determine in the lifetime of such ancestor or not.

As to a widow during widowhood, or to baron and feme during their joint lives, remainder to the heirs of the body of the widow or feme; though she could not have had an heir of her body before her

(z) 1 *Fearne*, 24. 26. (3d edit.) and 34. 38. 41. (4th edit.) [31. 33. 36. Butl. ed.] and *post.* p. 166. See *Dyer*, 9. pl. 22. *Hale on F. N. B.* 142. B. N. (b) cites 28 *Ed.* III. f. 93.

(a) See the case of *Roe v. Aistrop*, 2 *Blackst. Rep.* 1228.; and *Fearne*, 28. 46. (3d edit.) and vol. 1. p. 40. 81. (4th edit.) [35. 63. Butl. ed.] But to baron and feme *for the life of the feme*, remainder to the baron in tail, remainder to the right heirs of the baron; feme survives,—tail *not executed*. See *Bro. Tit. Tenure*, pl. 54.

death,

death, yet she might have married in the first case, or the husband might have died in the other, before that event; yet the estate-tail was executed (b).

Nor whether the estate of the ancestor be expressly given, or arise by implication of law. 6thly, By implication.

As if A. seised in fee, covenant to stand seised to the use of his heirs male by his second wife; A. takes an estate for his own life by implication, and the estate-tail is executed in him (c).

But

(b) *Bro. Est.* 76. *Dyer*, 9. *pl.* 22. *Fearne*, 24. (3d edit.) vol. i. p. 34. (4th edit.) [31. Butl. ed.]

(c) 1 *Vent.* 372. *Pybus* and *Mitford*; and *Fearne*, 30. (3d edit.) 49. (4th edit.) [40 & seq. Butl. ed.]

Note; though the case of *Pybus v. Mitford* has been questioned, and even denied to be law, (see 7 *Vin.* 597. *Descent* (I). *pl.* 38. in marg.); yet the doctrine as laid down in the rule is correct. And though what is said in the case of *Southcott v. Stowell*, (2 *Mod.* 211. and 2 *Vern.* 735.) may be thought to invalidate the instance given, yet the rule stands unimpeached; there being other cases directly in support of the doctrine. See *Penhay v. Hurrell*, 2 *Vern.* 370. *Wills v. Palmer*,

[165] But here we must observe, that when a limitation is *expressly* made of the *freehold* during the ancestor's life, such express estate rebuts an implication.

As where A. conveyed lands to trustees and their heirs, in trust, during his life, to permit him to receive the profits; remainder to the first and every other son of his then-intended marriage, in tail-male: and, for want of such issue, to the heirs of his body generally; with remainder to himself in fee. The express estate to the trustees, during his life, precluded an *implied* one in A.; and, therefore, it was adjudged that the heirs of his body were *in by purchase* (d).

But if the limitations of the freehold be such as may determine during the life

2 J. Bl. Rep. 687. and 5 Burr. 2615. 1 Atk. 596. *Fearne*, 17. 30. 32, &c. (3d ed.); and 27. 50. 54. &c. (4th ed.) [25. 40, & seq. Butl. ed.] See 22 Vin. 283. *Uses*, (A. b.) pl. 2 in marg.

(d) *Carth.* 272. *Tippin v. Cosin*; and *Fearne*, 32. (3d. ed) and 52. (4th ed.) [43. Butl. ed.]

of

of the grantor, and *no express estate* be limited to him, the use will result to him for life in remainder expectant upon such precedent uses, and his heirs shall be in *by descent* (e).

Though the determination within the lifetime of the grantor, of any estate limited to others shall not, it seems, be presumed, if such determination must be effected by their *wrongful* act; as by the forfeiture or surrender of trustees (f).

But, if the freehold be passed to trustees and their heirs, and then any limitation be made, though only for years, to the grantor, which must take effect by transmutation of possession out of the seisin of the trustees, such express limitation to the grantor shall *prevent* his taking an estate for life by implication (g).

(e) See 2 J. Bl. Rep. 687.; and 5 Burr. 2615. Wills v. Palmer; and 1 Fearne, 54, &c. [44 & seq. Butl. ed.]

(f) Carth. 272. Tiffin v. Cosin.

(g) See 2 Lord Raym. 854. Adams v. Terre-tenants of Savage. 1 Fearne, 50. [42. Butl. ed.]

If the use limited to others than the grantor, be limited only *for years*, and *no use of the freehold be limited till the grantor's death*, the use of the freehold, as undisposed of till that period, seems to fall within the doctrine of resulting uses; and so the ancestor have an estate by implication to which the limitations to his heirs may attach (*h*).

And it seems that an estate may so result, or arise by implication, in the case of a trust, as well as of a legal estate (*i*).

But it is said that implication shall not be permitted in *a surrender* of copyholds, though it may be in *a will* of them (*k*).

Nor is it of moment whether the estates to the ancestor and the heirs be mediate or im-

7thly, Mediate or immediate.

(*h*) See *Fearne*, 81. (3d ed.) 49, 50. 61. (4th ed.) [42, 48. Butl. ed.]

(*i*) See 1 *Atk.* 596—7. in the case of *Hopkins v. Dare*.

(*k*) See 1 *Brownl.* 127. *Allen & Nash. Cro. Car.* 366. *Seagood & Hone.* 1 *Fearne*, 200. (3d ed.) 416. (4th ed.) [276. Butl. ed.] 1 *Watk. Copyh.* 115. [181. 2d ed.]

mediate.

diate. (See the rule in Shelly's case, before).

As to A. for life, remainder to the heirs of his body; or to A. for life, remainder to B. for life, remainder to C. in tail-male; remainder in tail general; remainder to the right heirs of A. (1). [166]

Nor whether the estate to the heir be such as must necessarily, or may possibly, VEST in the ancestor or not: for though there be an utter impossibility of its ever so vesting at all, yet if it ATTACHES in him as a contingent remainder, the heir shall be in BY DESCENT. 8thly, Vesting or not vesting. Attaching.

As to A. and B. during joint lives; or to husband for life, remainder to wife for life; remainder to the heirs general or special of the one dying first, or of the survivor: though

(1) *Trin.* 11 *Hen.* IV. fol. 74. b. pl. 14. *Fitz. Abr. Feoffmante*, pl. 109. *Co. Litt.* 22. b. 319. b. *Jenk. Cent.* 248. pl. 38. See 2 *Atk.* 57. *Godolphin v. Abingdon*; and 247. *Colson v. Colson*. And *Douglas*, 506. note; and *Fearne*, 21. 25. (3d edit.) and p. 30. 102. (4th edit.) [28. 32. Butl. ed.]

the

the limitation over is only a contingent remainder, yet it attaches in the ancestor, and the heir shall be in BY DESCENT (m).

But this rule applies only to those cases in which the estate to the heir is limited BY WAY OF REMAINDER, and does not extend to those in which the estate to the heir is A CONDITIONAL LIMITATION (n).

For, as the particular estate and the remainders over are but so many portions of the same estate, they shall, when they attach in the same person, as before noticed, be so united as to cause the heirs to be in by descent.

But the nature of a conditional limitation is essentially different from this. The conditional limitation is not a portion of the estate first created, but a new one to take place on a specified contingency on which

(m) *Co. Litt.* 378. b. 1 *Brown's Chanc. Cases*, 584. Appendix. *Highway & al. v. Banner & al.*; and see 1 *Fearne*, 32. 38. 133. 521. (4th edit.) [39. 33. 95. 356. Butl. ed.] and *Co. Litt.* 191. a. note (1). (Harg. and Butl. ed.) and *Ibid.* 26. a. 8 *Preston on Shelly's case*, 65.

(n) 1 *Fearne*, 414. 416. [275,-6. Butl. ed.]

the

the prior one is utterly to **cease**; these, therefore, are incapable of coalescing, since they cannot exist together.

A remainder is to commence when the particular estate is, from its very nature, to determine; it is, as it were, a continuance of *the same* estate: it is a *part* of the *same whole*. A conditional limitation is *not* the continuance of the estate first limited, but is entirely a different and separate one; it is not to commence on *the determination* of the first, but the first is to determine when the latter commences; it is the commencement of the latter which rescinds and destroys the former, and not the ceasing of the former which gives existence to the last. The particular estate and remainders are, in fact, (as the very terms imply,) but *one* and *the same* estate. The estate first appointed and the conditional limitation are separate and distinct estates (o).

(o) See 1 *Fearne*, 9, &c. 414. 416. [14, &c. 275, -6. Butl. ed.] *Sand. on Uses*, 182, &c.

As to EXECUTORY DEVISES, they may be divided into two classes. The first consists of those cases in which there has been a prior disposition of the *whole fee*; and the second, of those in which there has been *no* prior limitation made of the estate.

The first class falls immediately within the observations we have made with respect to conditional limitations. And as to the second, the very nature of the limitations it embraces is that there be *no particular estate* to support them; for if there be a particular estate, they are *not executory devises* but *remainders* (p): as if a limitation be to the *unborn son of A.*: in these cases, there being no particular estate, there can, of necessity, be none with which the executory limitation can unite.

Estate to the heir fixed in the ancestor.

But as to a *remainder*, we may here remark, once for all, that *whenever an ancestor takes the requisite particular estate, the*

(p) See *ante*, 134. N. (a).

subsequent

subsequent limitation to his heirs general or special, is by the law FIXED IN SUCH ANCESTOR; and if the subsequent limitation to the heirs be *unconditional*, it then vests in such ancestor; and if *immediate* also, (as to A. for life, with remainder to the heirs of his body,) it then is EXECUTED in him IN POSSESSION: if it be *mediate*, (as to A. for life, remainder to B. for life, remainder to the heirs of the body of A.) the subsequent limitation to the heirs is a remainder VESTED IN THE ANCESTOR, SUB MODO, *but not to be executed in him* IN POSSESSION *till the determination of the mesne estate.* But if the subsequent limitation be *contingent*, (as to the heirs of the ancestor dying first,) then it *attaches* in the ancestor as a contingent remainder: And if such contingency happen in the lifetime of the ancestor, it then becomes vested in him: and, consequently, in all these cases the heirs shall take BY DESCENT (q).

(q) See *Fitzh. Feoffment*, pl. 109. *Reliefe*, 4. *Bro. Done.* 11. *Estates*, 6. *Reliefe*, 2. See *Kitch.* 146. a. *Co. Litt.* 319. b. 345. a. 1 *Harg. Law Tracts*, 497. 499, 500. 503.; and 1 *Fearne*, 37—8. and 104. 108. (4th edit.) [33. 77. 79. Butl. ed.]

And

9thly, Copy-
holds.

*And what has been said applies as well to
COPYHOLDS as to freeholds (r).*

10thly, Le-
gal estates by
devise.

*So also as well to LEGAL estates BY DE-
VISE as by deed (s).*

11thly,
Trusts.

*So also as to trusts executed, or com-
pletely declared, and so as to take effect
immediately under the deed or will ori-
ginally creating the trust; with respect
to which, the same construction prevails
as in the cases of legal estates (t).*

But as to trusts *executory*, or to be car-
ried into execution by some future act, as
those in which the limitations are imper-
fect and something is left to be done by
the trustees in the first place, and, se-

(r) See 1 *Strange*, 487. *Smith v. Triggs*; and *Fearne*, 43. 49. (3d edit.) 79. 88. (4th edit.) [60. 67, 8. Butl. ed.]

(s) *Fearne*, 57. (3d edit.) 96. (4th edit.) [72. Butl. ed.]
And see 3 *Atk.* 294. *Warrick v. Warrick*; 1 *Harg.*
Law Tracts, 502.; and 3 *Pr. Wms.* 259. *Atkinson v.*
Hutchinson.

(t) See *Ca. Temp. Talb.* 19. *Lord Glenorchy v.*
Bosville. 1 *Fearne*, 171. 190, &c. [117. 128. Butl. ed.]
2 *Ves.* 655. *Garth v. Baldwin*.

condarily,

condarily, by a court of equity ; they are moulded by the court as best to answer the intent of the person creating them (*u*). (Though, where it does not violate such intent, the same rule is applied even to trusts executory as to legal estates (*x*)—).

And, therefore, the words “ heirs of the body ” are frequently taken as WORDS OF PURCHASE, if applied to trusts, when they would not be so if applied to legal estates ; and when so taken, are generally construed to the first and other sons, &c. in strict settlement (*y*).

[168]

Words of purchase.

Strict settlement.

Thus,

(*u*) *Ca. Temp. Talb.* 19. 1 *Fearne*, 167, &c. 190. 201. 205. 217, &c. [114. 128. 135. 142. &c. Butl. ed.] 1 *Atk.* 608. *Roberts v. Dixwell* ; and see *Bagshaw & Spenser in Collect. Jurid.* 412.

(*x*) 2 *Ves.* 655. *Garth v. Baldwin.* 1 *Fearne*, 184. 204, &c. [124. 135. &c. Butl. ed.]

(*y*) This construction is chiefly applicable in the cases of marriage articles.

For as, in marriage articles, a provision for the issue appears to have been the chief end in view, a court of equity will often consider them as purchasers, (1 *Pr. Wms.* 145. *Bale & Coleman* ; and 291, *Seale & Seale*,) and decree a strict settlement in the children ; in order to prevent one of the parents only from frustrating

Thus, when a particular estate of freehold is in the ancestor, the subsequent limitation

trating that intent, by destroying the entail which might otherwise have taken place in the parent, according to its legal construction.

And, therefore, where there is no danger of such end being so defeated, a court of equity will *not* interfere, but suffer the words to have their legal operation, and the entail to remain in the parent; as where the wife is made tenant in tail of lands moving from the husband. 2 *Ves.* 358. *Howell v. Howell.* 2 *Atk.* 477. in the case of *Green v. Eakins & al.* 1 *Fearne*, 131, &c. 162, &c. 2 *Pr. Wms.* 356, note.

But it seems that this rule will not hold as to copyholds; the stat. 11 *Hen.* 7. c. 20. not extending to them. See 2 *Cruise*, 158. 2 *Ves.* 358. note.

For where the power of altering such trusts has been vested in *both* parents, the court has refused to interfere. 2 *Ves.* 358. *Whateley v. Kemp.* (cited) 1 *Fearne*, 132, &c. [94. &c. Butl. ed.]

So where a strict settlement appeared to have been manifestly contrary to the intent of the parties. 2 *Ves.* 358—9. 1 *Fearne*, 135, &c. [97. &c. Butl. ed.]

Nor will the court interfere where a settlement has been made by the parties *subsequently to the articles*, but *before* the marriage: for the settlement will, in such case, be considered as a new agreement, and so controul them. *Ca. Temp. Talb.* 20. *Legg v. Goldwire.* 1 *Fearne*, 154. [107. Butl. ed.] 2 *Pr. Wms.* 356, note.

Unless such settlement be expressly alleged to have been made *in pursuance or performance of the articles*;

limitation to his heirs general or special shall be fixed in such ancestor, and the heirs

so that the presumption of a new agreement be done away. 1 *Pr. Wms.* 123. *Honor v. Honor.* 2 *Ibid.* 349. *West v. Erissey*; and 356, note. *Ca. Temp. Talb.* 20. *Legg v. Goldwire.* 1 *Fearne*, 138, &c. [98, &c. Butl. ed.]

But where the settlement is made *after* marriage, the court will set up the articles against the settlement. 3 *Atk.* 371. *Hart v. Middlehurst.* *Ca. Temp. Talb.* 20. *Legg v. Goldwire.* *Ibid.* 176. *Streatfield v. Streatfield.* 2 *Atk.* 39. *Glanville v. Payne.*

Yet where other property of a parent is limited to any of the issue, and the issue so provided for bring a bill for carrying the articles into strict settlement, the person so bringing the bill shall, in many cases, be put to election before the court will decree the execution of them. *Ca. Temp. Talb.* 176. *Streatfield v. Streatfield.* See 2 *Atk.* 39. *Glanville v. Payne.*

But if there were no articles entered into previously to marriage, there can, of necessity, be none to controul a settlement made afterwards; and where there are not articles as well as a settlement, the court will not construe words which make a legal estate-tail in the parent, to the first and other sons, &c. 3 *Atk.* 294. *Warwick v. Warwick.* 2 *Atk.* 39. *Glanville v. Payne.*

Unless, indeed, there is a direct declaration in the recital of the settlement that it was the intention of the parties to make a provision for the issue, by securing the premises settled, for their benefit, in which case the court will effectuate such intention by decreeing a strict settlement, if the words of the deed

12thly, Ultimate limitation to the heirs of the grantor.

heirs in BY DESCENT; and so also when the ultimate limitation is to the heirs general

would otherwise give an estate-tail to the parent, and enable such parent, at law, to defeat the provision for the issue, contrary to the recited intention. But where the recital to assure the lands is in general terms, or expressly, to settle them "*to the uses thereafter mentioned,*" a court of equity will not interfere, but suffer the words to have their legal effect. See 3 *Brown's Chanc. Ca.* 27. *Doran v. Ross.* 1 *Ves. Jun.* 57. S. C. and 170. *Payne v. Collyer*; and see 2 *Ves.* 358. *Howell v. Howell*; and *Cowper*, 12. *Moore v. Magrath.*

And note; that, in case of articles, it is not enough that they be recited; they must also be produced: *Ambler*, 515. *Cardwell v. Mackerill*; and 1 *Fearne*, 159. [109. Butl. ed.]

Nor will a strict settlement be decreed in favour of collaterals, unless it should be apparent, from the circumstances of the case, that they were included in the considerations; for the intention of such articles seems *prima facie* to be only to provide for the issue of the marriage: or unless the articles be decreed as to the persons first claiming; in which case the court will decree in their favour also; as it always executes articles *in toto*, or not at all. See 10 *Mod.* 533. *Osgoode v. Stroud.* 2 *Pr. Wms.* 245. S. C. 2 *Ibid.* 594. *Vernon v. Vernon.* 1 *Ves.* 73. *Stevens v. Trueman.* 3 *Atk.* 186. *Goring v. Nash.*

But, as the chief view of the court is to secure a provision for the issue independently of the parent, it will decree an execution in favour of the children of the

neral (2) of the grantor or deviser, or any undispensed of portion of the estate continue in

the party covenanting to convey, and for whom that parent was morally obligated to provide, although such children be not the issue of the very marriage in consideration of which the articles were entered into; as those of a former, or of a future, marriage: or where a father covenants to settle lands on the marriage of his son, with remainder over to a daughter and the heirs of her body, it will carry the articles into execution in favour of the issue of the daughter; since the father was morally obliged to provide for her also. See the cases last cited; and, particularly, *Goring & Nash*. 2 *Ves.* 216. and 1 *Atk.* 265. *Newstead & al. v. Searles & al.* *Cowper*, 710. *Doe d. Watson v. Routledge*.

There is no difference between articles and trusts *executory* in wills. See 1 *Fearne*, 166, &c. [113. *Butl. ed.*] See also *Ca. T. Talb.* 3. and 2 *P. Wms.* 471 & 478. N. (1).

Nor will equity decree a strict settlement, even in the case of articles, against purchasers for a valuable consideration and without notice. 3 *Atk.* 291. *Warwick v. Warwick*. 1 *Fearne*, 156, &c. [108, &c. *Butl. ed.*]

But a settlement, though made after marriage, by a person not indebted at the time, will be good against subsequent creditors. 1 *Atk.* 15. *Russell & al. v. Hammond & al.* *Ibid.* 265. *Newsted v. Searles*. 2 *Ves.* 11. *Lord Townshend v. Windham* 2 *Brown's Chanc. Ca.* 90. *Stephens v. Olive.* *Cowper*, 705. *Doe d. Watson v. Routledge*.

(2) See *post*, 179. of a deed, &c.

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him, his heirs shall succeed thereto BY DESCENT, *though* THE ANCESTOR HIMSELF TAKE NO PARTICULAR ESTATE. For such ultimate limitation will still be in him as a reversion (a).

And as to this, the rule is, that

Portion undisposed of is part of the old estate.

Whatever portion of the estate (b), or use (c), or trust (d), IS NOT DISPOSED OF, remains in the person who disposes; and will DESCEND to his right heirs: for being part of the OLD ESTATE, it shall continue to go as if no disposition at all had been made of it; i. e. if it had descended from the mother, to

(a) See 1 *Fearne*, 66. (4th edit.) [51. *Butl.* ed.]

(b) 3 *Pr. Wms.* 63. *Chester v. Chester*. *Ca. Temp. Talb.* 44. *Hopkins v. Hopkins*. 1 *Atk.* 581. *S. C. Butl. N.* (1). to *Co. Litt.* 271. b. *S. C. Preced. Chanc.* 542. *Emblyn v. Freeman*.

(c) *Co. Litt.* 23. a. 271. b. and *N.* (1).

(d) 3 *Pr. Wms.* 21. *Cruse v. Barley*, and *N.* (1) 2 *Vern.* 644. *Hobart v. Countess of Suffolk*. *Ca. Temp. Talb.* 165. *Robinson v. Comyns*; and 254—8. *Mansell v. Mansell*. 2 *Atk.* 150. *Lloyd v. Spiller*. 1 *Ves.* 108. *Arnold v. Chapman*; *Hopkins v. Hopkins*; and *Emblyn v. Freeman*; *ubi sup.* See also 8 *Durnf. & East*, 597. *Challenger v. Sheppard*.

the

the heirs of the part of the mother, and vice versa.

And this although a particular estate or sum be expressly given or limited to the heir at law : as if lands are devised to trustees to sell, and, out of the sale-money, to pay one hundred pounds to the heir at law, yet he shall have the undisposed-of surplus also. So, if an estate for life be devised to the heir, he shall have the reversion too (e). But if no further disposition be made than to the heir for his life, the fee descending shall merge the life estate (f).

As if a person, seised *ex parte materna*, devise or grant in tail, the reversion will remain in him, and shall descend to his maternal heirs (g).

(e) *Preced. Chanc.* 162. *Randall v. Bookey.* 1 *Pr. Wms.* 390. *Starkey v. Brooks.*

(f) See 3 *Leon.* 26. *Ca.* 53. *Cro. Jac.* 260. *Wood v. Ingersole.*

(g) See 2 *Inst.* 335. *Litt.s.* 19.; and *Co. Litt.* 22.b. and 2 *Bla. Comm.* ch. 7. p. 112.

So if he, after several mesne estates, limit the ultimate "remainder" to his own right heirs; for it is not a remainder, though it be called such, but the reversion, which shall descend as before (h).

And this although such ultimate limitation be *provisionally* made: as if the ancestor covenant to stand seised, or make a feoffment, to the use of his wife for life, with such ultimate limitation to his own right heirs; with a proviso that if the wife be disturbed by the heir, or any claiming under him, then to the use of the wife and her heirs. For such limitation to his own heirs is void as a remainder; being part of the old estate, to which the heir shall succeed by descent (i).

(h) See *Jenk. Cent.* 248. pl. 38. *Bro. Livery, & Oust le Main.* 61. *Ten.* 21.; and 2 *Atk.* 57. *Gedolphin v. Abingdon.* 2 Co. 91. b. Bingham's case; and cases there cited.

So of copyholds; see 1 *Watk. Copyh.* 95. [149. 2d edit.]

(i) See *Moore*, 742. pl. 1022. Barton's case; and see *Dyer*, 124. pl. 38. *Cro. Eliz.* 919. *Haynesworth v. Pretty.*

And

And note; that where the ultimate limitation of the wife's estate was to the right heirs of the wife, with a proviso for the wife to dispose of it "as she should think fit," it was held to be only a new qualification of THE OLD ESTATE, and not an alteration of it till such new qualification should be executed (k). [170]

But if an estate be to A. for life, with remainder to "the next heir male" of A. in the SINGULAR number, and WORDS OF LIMITATION BE GRAFTED THEREON, such heir shall take BY PURCHASE: the words "next heir male" being only expressive of the person who should take, or as a *descriptio personæ* (l).

(k) *Abbot v. Burton*, 11 *Mod.* 181.; and in 14 *Vin.* Heir, (W. 2.) pl. 6. p. 289.

(l) See *Archer's case*, 1 *Co.* 68.; and see farther, *Ferne*, 102. 294. (3d edit.) and 229. 548. (vol. i. 4th edit.) [150. 374. Butl. ed.] *Powell on Devises*, 363. *Godbolt*, 155. pl. 207. *Robins. on Gavelk.* b. 1. c. 6. p. 95—7. 2 *Strange*, 731. *Goodright d. Lisle v. Pullin & al.*; and see *Harg.* note (4) to *Co. Litt.* 8. b. and authors there referred to; and 1 *Harg. Law Tracts*, 505—7.; and 2 *Burr.* 1110. *Doe d. Long v. Laming*. See also *Moore*, 593. *Clerke v. Day*.

And we may observe, on this point, that, when an estate for life is limited to a person, and another is limited over to his heirs, or issue, if it should appear that by the words heirs or issue was meant a certain or particular *person*, with relation to the time when such limitation should take place, (as the death of the tenant for life,) then such words shall be *words of purchase*; but if the testator intended to comprehend, by such words, a *class* or *denomination of heirs*, and intended to embrace them *indefinitely*, then they shall be *words of limitation* (m).

Resulting
use.

So also if the entire use results; he being then in of his ancient use.

[171] For the use follows the nature of the land from which it springs; “as the shadow follows the body.”

And, therefore, if a person, seised of

(m) See *Harg. Law Tracts*, 561. 1 *Bro. Ch. Cas.* 206. *Jones v. Morgan*.

land

land as heir on the part of his mother, make a feoffment, or levy a fine, *sur cognizance de droit come ceo*, &c. without declaring the uses to which it shall enure, the use results; and the heirs on the part of the mother shall succeed (n).

So the resulting use of gavelkind-lands shall descend to all the sons; and of lands in Borough-English to the youngest (o).

So a resulting use of copyholds shall follow the customary descent (p).

So also of a trust (q).

And, as the use shall follow the descent, so shall it result also according to the

(n) *Co. Litt.* 12. b. N. (2). 13. a. N. (2). 2 *Co.* 58. a. Beckwith's case; and *post*, 181. 185—7.

(o) See *Robins. Gavelk.* 78—9. b. 1. ch. 5. and authors by him cited. *Bro. Feoffm. al. Uses*, 32.; and see 2 *Ves.* 300. *Fawcett v. Lowther*.

(p) See *Fawcett v. Lowther*, *ubi sup.* See 22 *Vin. Uses*, (Y. a.) pl. 6. i *Watk. Copyh.* 215. [328. 2d ed.]

(q) *Fawcett v. Lowther*; and 22 *Vin. Uses*, (D). pl. 7. *Watk. Copyh. ubi sup.*

quantity

quantity of the estate which the grantor or grantors had before in the lands: as if there are two joint-tenants for life, with the remainder over in fee to one of them, the use shall so result; and they shall continue in in the same manner. So of tenant for life and reversioner (r).

Trust.

So if the ultimate limitation OF A TRUST be to the right heirs of the person creating it, such heirs take BY DESCENT, while such trust continues: for trusts are subject to the same rules, as to descents, as legal estates (s). But if such heir gain the legal estate by descent or purchase, such trust estate becomes extinct (t).

Incidents follow the reversion.

And as the ultimate limitation (or re-

(r) 2 Co. 58. a. Beckwith's case. 1 Co. 136. b. Chudleigh's case.

(s) 2 Pr. Wms. 713. Banks v. Sutton. 736. Cowper v. Earl Cowper. 2 Bla. Comm. ch. 20. p. 337.; and see 1 Atk. 596. Hopkins v. Hopkins. 2 Atk. 67. Godolphin v. Abingdon. Ca. Temp. Talb. 3. Lord Glenorchy v. Bosville.

(t) See the case of Doe on dem. of Balch v. Putt, in Dougl. 771. and post. 181, &c.

version)

version) of an estate shall thus descend to the heirs of the part of that parent from whom it came, so shall ITS INCIDENTS: as, from the very nature of the thing, the incident shall follow, and be ruled by, its principal.

And, therefore, if A. seised in fee *ex parte materna* makes a gift for life, or in tail, reserving *rent*, and dies without issue, the rent shall go to his heir on the part of his mother (u). Rent.

So if he had had a rent-sock, and a *distress* was afterwards granted to him and his heirs, the distress should go with the rent, as an incident to it, to his heirs *ex parte materna* (x). [172] Distress.

So if he has a house *ex parte materna*, and one grant to him that he and his heirs shall have competent *estovers* to be burned in such house; these, though a new pur-

(u) Co. Litt. 12. b. and post.

(x) 8 Co. 54. a.; and Co. Litt. 12. b.

chase,

chase, shall go with the house, as appurtenant to it, to his heirs of the part of his mother (y).

Condition.

But *a condition*, it is said, shall *not* go to the heirs of the part of the mother, for it is not an incident: and, therefore, if such estate had been granted on condition, the heir *ex parte* PATERNA should have taken advantage of it; but the heir *ex parte* MATERNA might have entered on him, and enjoyed the estate (z).

[173]

Thus, so long as the estate which is derived *ex parte materna* CONTINUES, so long shall it DESCEND *to the maternal heirs*; but if such estate be made to fix BY PURCHASE in him who is heir *ex parte materna*, the estate so fixed shall descend to HIS heirs *on the part OF HIS FATHER*, as before asserted.

(y) 8 Co. 54. a.

(z) Co. Litt. 12. b. Plowd. 57. a. (where Montague, C. J. calls this "a cunning case.")

But indeed the doctrine seems justly questionable. See *Robins. on Gavelk.* b. 1. c. 6: p. 121. and note.

We

We will now, therefore, proceed to inquire what act of the person, seised *ex parte materna*, will fix the estate so derived, in him or his heirs BY PURCHASE, and, consequently, change the descent to the paternal line?

What shall change the descent from the maternal to the paternal line.

And to effect this, he must acquire, or give, A NEW ESTATE: for if the person taking be *in*, in any wise, of the OLD ONE, he is *not in* AS A PURCHASER: and, therefore, its descent will *not* be changed. New estate.

As if the heir enter for condition broken, he is *in* of the OLD estate, and, consequently, BY DESCENT (a). Old estate.

We will, therefore, consider the opera- [174]

(a) See *Jenk. Cent.* 249. pl. 40. *Co. Litt.* 12. b. 76. a. and 202. a. and b. 1 *Co.* 95. a. 99. a. *F. N. B.* 143. Q.

So of a copyholder who surrenders on condition; on its being broken, or fulfilled, (as the case may be,) he may enter, and shall be in *in statu quo prius*, without a new admission or fine. See *Co. Copyh.* s. 56. *Tracts*, p. 128. *Kitch. Courts*, 123. a. (Fr. edit.) *Calth.* 60.

tion

tion of his devise, his deed, his fine, and his recovery.

Devise.

And, first, as to A DEVISE.

And as to this, the law is, that

When it shall
not alter the
descent.

When a person devises such lands to his right heirs, WITHOUT CHANGING THE TENURE OR QUALITY OF THE LANDS, although he charge them with debts or other incumbrances, yet the heir shall be in BY DESCENT; and the lands shall go, on his death without issue, to his heirs ON THE PART OF HIS MOTHER (b): for descent is favoured in law.

(b) *Lord Raym.* 728. *Emerson v. Inchbird.* *Ibid.* 829. *Reading v. Rawsterne, or Royston.* *Comyn's Rep.* 123. *Ca.* 86. *S. C.* *Ibid.* 72. *Ca.* 45. *Clarke v. Smith.* 2 *Stra.* 1270. *Allen v. Heber.* 1 *Blackl. Rep.* 28. *S. C.* 2 *Atk.* 299. *Plunkett v. Penon.* 2 *Burr.* 879. *Hurst & al. v. Earl of Winchelsea & al.* 2 *Bl. Comm.* 241—2. *ch.* 15. *Co. Litt.* 12. *b. N.* (a) *Dyer*, 124. *pl.* 38. 3 *Leon.* 26.; and see further, *Com. Dig.* *Devise*, (K). and *Viner*, *Devise*, (P. c.) Wherever the heir could take the same estate without the will, the devise shall not operate. See *Dyer*, 133. *b. pl.* 6. *per* Saunders, C. J. [See also 1 *Barnew. & Alders.* 530. *Doe d. Pratt & al. v. Timins & al.*]

And

And it is the same as to COPYHOLDS, notwithstanding they pass by surrender; for such surrender, and the consequent admission, will not make a new estate (c). [175]

And the old cases, (1 Cro. 161.) that if a man devise to his heirs in fee upon condition, the heir shall take by purchase; and the opinion in 2 Mod. that if a man devise to his heir, paying 20l. the heir shall take by the will, and not by descent; are (said to be) unintelligible, and ill-reported. *For if a man devise lands to his heir, CHARGED WITH A RENT ISSUING OUT OF THEM, the heir shall take BY DESCENT (d).*

And it is not in the election of the heir.

(c) See 1 *Strange*, 487. *Smith v. Trigg*; and *Fearne*, 49. (3d edit.) 87. (4th edit.) [67. Butl. ed.] See also *Hurst v. Morgan*, E. 28 Geo. 2. 1755, in *Chanc.* & on *Certif.* from B. R. 27 Nov. 1759. 1 *Watk. on Copyh.* 193. 2d edit. and 1 *Barnew. & Alders.* 530. *Doe d. Pratt & al. v. Timins & al.*]

(d) *Clark and Smith, Comyns's Rep.* 72. ca. 45.; and *Cro. Eliz.* 833. pl. 2. and 919. pl. 14. *Hayns worth v. Pretty, Acc.*

to

[176]

to be in by purchase or by descent; for the law casts the descent on him immediately on the death of the ancestor, and the devise is absolutely void. Besides, could the heir, by his election, have taken by purchase, he would have defeated his lord of many emoluments of his seignior, and deprived the specialty creditors of his ancestors of the fund which was answerable for their demands: for till the statute of *Will. 3.* the devisee was not chargeable, and even that statute does not affect our present subject (e). Indeed, the cases on this point go apparently upon the supposition that the heir has *no* election; and consider the devise as absolutely void, as having "no operation at all," and not as being dependant upon the will of the heir (f).

But

(e) See 2 *Strange*, 1270. *Allen v. Heber*; and see also 1 *Lord Raym.* 728. *Emerson v. Inchbird*; and 2 *Burr.* 1106. *Long v. Laming*.

(f) See the cases of *Reading and Royston*, and *Allen v. Heber*, *ante* and *post.*; and *Hob.* 30. 1 *Freem.* 24 pl. 263. *Brittane v. Charnock*; and see *Pow. on Dev.* 427. 430. 1 *Strange*, 491. *Smith v. Trigg*.

3 Le

But if the devisor ALTER THE ESTATE, AND LIMIT IT DIFFERENTLY FROM WHAT IT WOULD HAVE DESCENDED TO THE HEIR, the heir shall take, of course, BY PURCHASE; it being ANOTHER ESTATE; which must descend from such heir, AS THE FIRST PURCHASER, to his heirs on the part OF HIS FATHER (g). When it shall.

And, therefore, if a person seised in fee devise his lands to his eldest son IN TAIL, the son, though heir at law shall take BY PURCHASE; for it is a *different* estate from that which would have descended to him (h). [177]

And if the devisor had been seised *ex parte materna*; or if a mother had so devised to her son; as the devisee would take

3 *Leon.* 118. Ca. 167. Bashpool's case. 4 *Leon.* 35. S. C. and see *Butl. Continuation of Harg.* N. (1). to *Co. Litt.* 64. a. (Sect. v. (3)—).

(g) See the references in note (b), p. 174.

(h) *Trin.* 3 *Hen.* VI. pl. 1. fol. 46. a. *Plowd.* 545. b.; and see the case of *Wills v. Palmer*, 2 *Bla. Rep.* 687.; and 5 *Burr.* 2615.

T

such

such entail AS A PURCHASER, should he afterwards suffer a recovery, the fee so effected would descend to his heirs *on the part OF HIS FATHER* (i).

So whenever a person, seised in fee, *devises* an estate to his heir at law and *limits a remainder over*, the heir shall take by the devise and be in *by purchase* (k). But if, *on the other hand*, he had devised the particular estate to a stranger and the remainder over to the heir in fee, the heir should be in *by descent* (l).

Note then, the difference when the heir takes a particular estate and the ultimate limitation be to a stranger, and when the particular estate be to a stranger and the ultimate limitation to the heir at law. The estate taken by *descent* must be the old fee; but the ultimate limitation to a

(i) See *post*. p. 187.; and case of *Martin v. Strachan*, 1 *Wils.* 66.

(k) See *Bro. Devise.* 4. and 41.; and *ante*, Case of *Wills and Palmer*.

(l) *Ante*, p. 169. 174.

stranger

stranger necessarily prevents the prior one to the heir from being a fee; and, consequently, *that* so taken by the heir must be a *different* one from that which was in the ancestor. Whereas, if the *ultimate limitation* be to the heir at law, it must be part of the old fee, undisposed of; the devise being void; as conveying the *same* estate (in point of *quality*) as that which would have descended to him, and which was once in the ancestor (*m*).

So, in the case of an *executory devise*; the heir at law shall take the estate *by descent* until the contingency arise; for *until* that event, *the fee* is not affected; and, consequently, *the same estate* which was in the ancestor devolves to the heir (*n*).

So if a person has several daughters, who would be his heirs at law, and devise to them in fee, they shall take AS PURCHASERS. For though they would have

(*m*) *Ante*, p. 175—6.

(*n*) *Ante*, p. 134.; and *post.* 179.

succeeded to him as his heir, yet that would be *in parcenary*; whereas here they take *in joint-tenancy* or *common* (o).

[178] So where A. having two daughters, (one of whom died, leaving a son,) devised his land to the son of his deceased daughter; the son took AS A PURCHASER. For, “by this devise there was an alteration of the estate; for if the land had *descended*, both the daughters would be but one heir, and would take as coparceners: but when a devise is made of all to one, or the son of one, of the daughters, then the devisee

(o) *Cro. Eliz.* 431. *pl.* 36.; and see *Godb.* 362, 363. *ca.* 455. Taylor & Hodgskins; and *ante*, p. 150. note (d); and *post.* note (q). 3 *Atk.* 731. *Rigden v. Vallier*. [So where a person devised certain estates to trustees in fee, upon trust to sell and pay debts, &c., and after payment thereof to pay and apply the rents, &c. to A. for life, and after his decease devised the said estates to the heir or heirs at law of B. in fee, and directed the trustees to convey accordingly, it was held, that the co-heirs of B., notwithstanding they were also co-heirs of the deviser, took as joint-tenants by purchase, and not as coparceners by descent. 15 *Ves. Jun.* 365. *Swaine v. Burton*.]

takes

takes BY PURCHASE in a *different manner* from what would be, in case the land had descended (p)."

So if a person has several sons, and, being seised of lands in gavelkind, devise to them; they would take BY PURCHASE, as joint-tenants, or as tenants in common (q).

So if one seised of lands at common-law, devise them to his eldest son and a stranger, it is a good devise; and they shall take AS JOINT-TENANTS (r).

But

(p) *Com. Rep.* 123. ca. 86.; and 2 *Lord Raym.* 129. *Reading v. Royston.*

(q) *Moore*, 864. pl. 1190. *Sparke v. Purnell.* See *Robins. on Gavelk.* b. 1. c. 6. p. 126—7. and authors there referred to; and see also 2 *Burr.* 1100. *Long v. Laming*; and 1 *Hen. Bla. Rep.* 1—5. E. 28 *Geo.* 3. *Dally v. King*; and see 3 *Atk.* 731. *Rigden & al. v. Vallier.*

(r) *Godb.* p. 94. ca. 105. and see 1 *Hen. Blackst.* 1. *Dally v. King.*

So if a father had enfeoffed his son and heir and a stranger, with remainder to the heirs of the son; the son should have taken *by purchase* for the benefit of

But if the testator devise to his son and a stranger, or to two or more of his sons (one only being his heir) *in common*, it should seem that the son being heir at law shall take his portion *by descent*.

For, as Mr. *Fearne* remarks (s), and I think very justly, if we suppose a testator to devise a moiety or any other share of his real estate to a stranger, making no disposition at all of the remaining undivided share, such remaining undivided share would, of course, descend to his heir at law, and he must hold *in common* with the devisee of the undivided share devised. It is clear, therefore, he adds, that an heir may take *by descent*, as *tenant in common* with a devisee, an undivided the stranger; though, had it not been for the stranger, it would have been deemed a mere collusion for the purpose of defrauding the lord of his worship. *Per Danby. Pasch. 33 Hen. 6. pl. 6. fol. 15. b.*

So a devise to A. for life, with remainder to the right heirs of the testator and of B.; and B. die in the life-time of A. the heirs would take as joint-tenants. See 1 *Roll. Rep.* 317.

(s) *Pett. Works*, 130—2.

part

part of the estate, which his ancestor was solely seised of: and it should, therefore, seem to be immaterial, whether the share he would so take be *expressly devised to him*, or left unnoticed by the *will*; for if expressly devised he would take it in *common*, and, if not noticed, he would take it *in the same manner*; and a devise to two as *tenants in common* is, in effect, a devise of one undivided part *to one*, and of *another undivided part to the other*; so that under such a devise to an heir and another, as *tenants in common*, the heir takes as if *one undivided moiety* were devised to *the other*, and the residue to himself; that is, in the same manner as if no disposition at all of such residue had been expressed in the will; in which case he would have taken by descent; and, therefore, the same estate being devised to him in such residue as he would have taken by descent, the general rule, respecting devises to an heir, seems to extend to it.

“ It has, indeed, been held (t), that a devise to *the heir and another*; makes the heir a purchaser; but that seems, says Mr. *Fearne*, to be on account of the *joint-tenancy* and benefit of *survivorship* to the stranger. And it appears that, under a devise to *two co-heirs* (u), they take as joint-tenants by the will, and not *by descent*; and so in a devise to them *in common*, they take as *tenants in common*, and not *by descent*. But, it is evident, under either of these tenures, they take *every part* of the land devised in a different manner than *by descent*; whereas, in the case of a devise to the heir *and another*, as *tenants in common*, the heir seems to take *the part devised to him* just in the same manner as if it had been left *to descend* to him, and, consequently, that no obstacle would arise as to the eldest son’s taking his *moiety by descent*; and, consequently, if the testator had had the lands from his mother, that

(t) *Ante*, (p). 178. (r).

(u) See *ante*, p. 177. (o). and 178. (q).

such *moiety* would descend from the eldest son to his heir on the part of his paternal grandmother."

So where one devised to his son and heir, "but in case he died without issue, not having attained twenty-one," *then over*: the son attained twenty-one. By HENLEY, *Lord-Keeper*, "the eldest son took BY DEVISE, as having, under the will, a different estate than would have descended to him: the one being pure and absolute, the other not." And reference was made to the case of *Allum v. Heber*, *Lutw.* 797; and 1 *Salk.* 241 (*x*). [179]

But in the case of *Hinde v. Lyon* (*y*), where a devise was "to the wife till the heir should be of the age of twenty-four years, and that at that age the heir should have the lands to himself and his heirs for ever; and that when he should come to

(*x*) *Ambler*, 383. *Scott v. Scott*. [But see as to this case, 1 *Barnew. & Alders.* 542. 547.]

(*y*) *Dyer*, 124. a. pl. 38. 2 *Leon.* 11. 3 *Ibid.* 64. 70. and see 3 *Leon.* 118. *Bashpool's case*.

the

the age of twenty-four years, the wife should have the third part during her life: and if the heir died before the age of twenty-four years, that then the lands should remain to the wife during her life, with remainder, after her death, (if the heir had no issue,) to the daughter of the devisor in tail, remainder to the right heirs of the devisor;" it was adjudged that the heir, having attained twenty-four, was in *by descent*.

In this case, therefore, the heir was not to take till he attained twenty-four; but, so soon as he would have taken, he would have taken the *absolute fee*, (not a *base-fee*, as in *Scott v. Scott*); and as he would have taken an absolute fee under the will, it would have been the same estate as he would have taken without the will; and, consequently, he would be in by descent, as of the worthier title.

Deed.

And as to A DEED, the law is, that

A person

*A person CANNOT raise A FEE-SIMPLE to Fee-simple.
his own right heirs, by the name of heirs, AS
A PURCHASE, unless he parts with THE
WHOLE ESTATE (z).*

*Neither can he make THE HEIRS OF HIS Fee-tail.
BODY to take BY PURCHASE, by conveyance
AT COMMON-LAW (a):*

As if he limit an estate to A. for life, [180]
with remainder to the heirs of his own
body; such remainder is void.

But if it had been BY WAY OF USE, as Use.
to A. and his heirs, to the use of B. for life,
with remainder to the use of *the heirs of*
THE BODY of the donor; the heirs of his
body would take BY PURCHASE (b).

Yet

(z) *Co. Litt.* 22. b. *Dyer*, 156. pl. 24. *Hob.* 30.
1 *Vent.* 372. 1 *Pr. Wms.* 359. 387. 2 *Atk.* 57.
2 *Bla. Rep.* 687—9.

(a) *Co. Litt.* 22. b. *Brooke, Done*, 32. and *Taile*,
11. *Dyer*, 156. pl. 24. 2 *Bla. Rep.* 687. and
1 *Fearne*, 67. (4th edit.) [51. *Butl. ed.*]

(b) See *Carth.* 272—4. 1 *Fearne*, 67. and 118—
119. (4th edit.) [51. & 86, 87. *Butl. ed.*]

But note, in order to make the heirs of the body of
the

Heirs general.

Yet had the remainder been (or had there been a subsequent remainder) to *his heirs* GENERAL, they would have taken BY DESCENT and been in of the OLD estate (c).

Parting with the whole estate.

But if the grantor part with HIS WHOLE ESTATE, and *then* a limitation be either to his heirs general or special, such heirs shall take BY PURCHASE; for here the reason fails: the limitation cannot be considered as *the reversion*, for that is always *a part of the estate granted which remains in the grantor (d)*: but where THE WHOLE is granted, there is nothing which can remain in him; and, consequently, there can be *no reversion*; for if there be a

the grantor or donor to take by purchase; the estate must be so limited as to exclude the presumption of an *implied* life-estate in such grantor; as, otherwise, such limitation to the heirs of his body may fix in the ancestor, and so the heirs be in by descent. See *ante* 164—5.; and the case of *Wills v. Palmer* in 2 *Bla. Rep.* 687.; and 5 *Burr.* 2615.; and 1 *Fearne*, 54, &c. (4th edit.) [44, & seq. Butl. ed.]

(c) See *ante*, p. 169.

(d) *Co. Litt.* 22. b.; 2 *Bla. Comm.* 175. ch. 11.

reversion

reversion left, he has *not* granted ALL. [181]
 If, therefore, a person grants to A. and his heirs for ever, (in fee-simple,) he can have no reversion left in him; and so any estate limited afterwards to him or his heirs must be *a NEW estate*, and taken BY PURCHASE.

As if A. seised *ex parte materna*, make a feoffment in fee, and take back an estate to him and his heirs; this is A NEW PURCHASE: and if he die without issue, his heirs *on the part of* HIS FATHER shall inherit (e). Feoffment and re-enfeoffment.

“ But this must be understood of *two* Use. distinct conveyances in fee: the *first* passing *the use as well as the possession* to the feoffee, and so completely divesting the feoffor of *all* interest in the lands; and the *second* re-granting the estate to him.”

(e) Co. Litt. 12. b.; and see *Brooke, Liv. & Ouster le Maine*, pl. 61.

“ For

[182] “ For if in the first feoffment the use had been expressly limited to the feoffor and his heirs, or if there was no declaration of uses and the feoffment was not on such consideration as to raise an use to the feoffee, and consequently the use resulted to the feoffor; in either case he is in of his *ancient use*, and NOT BY PURCHASE (*f*).”

But I conceive that, before the statute of 27 Hen. VIII. c. 10., it was by no means requisite that the use should pass to the feoffee on the feoffment, so the legal estate was divested out of the feoffor. For though the use was not conveyed by the first feoffment to the feoffee, but resulted or was expressly limited to the feoffor or his heirs, yet, that on the re-

(*f*) Hargrave's note (2) to Co. Litt. 12. b.; and see Co. Litt. 13. a. and 22. b. Serjeant Cartho's Readings on the Law of Uses, in the Collect. Jurid. vol. i. p. 370. 376—7.; and see also 2 Co. 58. a.; and Brooke, Liv. & Ouster le Maine, 61.—Fine to A. to the use of him and his heirs, to make him tenant to *precipe* for suffering a recovery, which was to enure to the use of the Cognizor and his heirs:—the *old use*. See 2 Salk. 491. Abbott v. Burton. And see 5 Durnf. & East, 107. in note.

enfeoffment

enfeoffment by the feoffee, the feoffor would have been in of a new estate, and so the line of descent have been changed (g).

For, although such use so limited or resulting to the feoffor, even before the statute (h), would have been the *ancient use*, yet if the *legal estate* was afterwards conveyed to the *cestuy que use*, it would have, certainly, vested in him *by purchase*, and have gone to his paternal heirs. For, though the *use* was the *old use*, the *legal estate* would have been a *new one*; it having before passed entirely from the feoffor. And, on the re-conveyance to him, the old use would have been extinct: in the same manner as a conveyance of the legal estate by a trustee would, at this day, vest in the *cestuy que trust* as a purchaser, and extinguish his equitable interest; as we are about to notice.

Thus, if an estate, descended *ex parte*

(g) See *Carthew*, 141. *Rice v. Langford*; and see also *Hale's Comm. Law*, 269. ch. 11.; and 3 *Ves. Jun.* 339. 342. *Selby v. Alston*.

(h) See 1 *Co.* 100. b.

materna,

materna, be conveyed to A. and his heirs, to the use of him and his heirs, upon certain trusts; and the ultimate limitation of such trust be expressly made, or a portion be unlimited, and so result to the person conveying, or his heirs, such trust, so limited or resulting, will be part of the old estate, and go to his heirs by descent (i). For though the grantor thus divests himself both of the legal estate and the use (k), yet the beneficial interest appertains (when not otherwise disposed of) to the person who would have been entitled to the legal estate if it had not been conveyed (l); in

(i) See *Bro. Feoffm. al. Uses*, pl. 32. 22 *Vin.* 185. *Uses*, (D). For trusts are subject to the same rules, as to descents, as legal estates: See 2 *Pr. Wms.* 713. *Banks v. Sutton.* *Ibid.* 736. *Cowper v. Earl Cowper.* 2 *Bl. Comm.* 337. ch. 20. See also *Rep. Temp. Talb.* 3. *Lord Glenorchy v. Bosville.* 1 *Atk.* 596. *Hopkins v. Hopkins.*

(k) 1 *Atk.* 589. 591. *Hopkins v. Hopkins*; and *Ibid.* 622. *Hawkins v. Chappel & al.* *Rep. Temp. Talb.* 165. *Robinson v. Comyns.* *Carth.* 272. *Tippen v. Cosin.* *Comyns's Rep.* 242. *Daw v. Newborough.*

(l) See *ante*, p. 169, (d). and *Co. Litt.* 272. b. 2 *Ves.* 304. *Fawcett v. Lowther.* *Carthew*, 141. *Rice v. Langford.*

the

the same manner as the use would have done before the statute on the conveyance of the legal estate. And as a trust now is what a legal estate then was (*m*), it must follow that, as such use, whether expressly limited or resulting, was the ancient use, a thing collateral and annexed in privity to the estate of the land, and to the person touching the land (*n*), and so, as it were, a portion of the *old estate*, such trust, so limited or resulting, must be a portion of the old estate also.

But, if such trust estate descend *ex parte materna*, and the legal estate be afterwards conveyed to the *cestuy que trust*, he shall take such legal estate by purchase; and, consequently, it shall go, on his death, to his heirs on the part of his father: and the trust estate shall merge in the legal when they both become fixed in him.

(*m*) 2 *Atk.* 150, *Lloyd v. Spillet*; and see *Co. Litt.* 172. b.; and *Butl.* note (2.) to *Co. Litt.* 171. b. 1 *Atk.* 591. *Hopkins v. Hopkins*. 2 *Bla. Comm.* 336. ch. 20. *Carthew*, 141. *Rice v. Langford*.

(*n*) *Co. Litt.* 272. b.

U

As

[183] As where a woman conveyed an estate to trustees in trust to permit her to receive the profits during life; and (after several mesne limitations of such trust) in trust for her right heirs. The trust descended: and afterwards one who was her heir, as to a moiety of the premises, had the legal estate conveyed to him by the trustee: and it was held that the *legal* estate vested in him BY PURCHASE, and that it should descend to his heirs on the part of the father, and could not follow the old use (o).

For as to heirs *ex parte paterna vel materna*, it does not appear that an heir of

(o) See the case of *Doe on Dem. of Balch v. Patt, or Pott, in Dougl.* 773, 774. 777.; and *post.* 191.

So, before the statute of uses, if a person enfeoffed another to the intent to pay his debts, and then to re-enfeoff his own heirs; upon such enfeoffment, the heir should not have been in ward; and, consequently, would have been in by purchase. See *Brooke, Garde*, 5.

Thus, whether we consider this to have been an use or trust, (See *Sanders on Uses*, 9. 14. 18.) yet we see that, on the re-conveyance of the legal estate to the heir, it vested in him as a purchaser.

one sort has been ever held, even in equity, to be as a trustee for an heir of the other; but, when the legal and trust estates centre in the same person, the trust estate becomes absorbed in the legal (p).

And, upon the same principles, it should seem that if lands be *mortgaged in fee*, and, after forfeiture, be re-conveyed to the heir at law, although the heir at law took the equity of redemption by descent, yet that the *legal estate* must, on such re-conveyance, vest in him as a *purchaser* (q); and, consequently, go to his heirs *on the part of his father*: for a mortgagee is, till foreclosure, considered, even in equity, as a bare trustee for the mortgagor, as to the inheritance of the premises (r); and we have shown above, that, on the conveyance

(p) See *Dougl.* 779.; and *post.* 191. See also *Cas. Temp. Talb.* 164. *Sir John Robinson v. Comyns.*

(q) See the case of *Benson v. Scott* as reported in 12 *Mod.* 49. and 7 *Durnf. & East*, 103. *Doe d. Harman & Ux. v. Morgan.*

(r) 1 *Atk.* 606.

of the legal estate by a trustee to the *cestuy que trust*, such legal estate shall vest in him by purchase; when his equitable interest will be merged.

And here it may not be altogether useless to remark, that a consideration is not requisite to change the descent from the maternal to the paternal line; as in the cases of feoffment and re-enfeoffment;—*Fine sur done, grant, & render, &c. (s).*

Rent.

If a person so seised make a feoffment IN FEE, reserving a rent to him and his heirs, the rent shall go to his heirs *ex parte PATERNA (t).*

But otherwise of a rent reserved on a grant of such estate *for life* or *in tail (u)*; for, on such grant, the reversion was left in the grantor, which must descend to his

(s) See 2 *Atk.* 150. *Lloyd v. Spillet.* *Bro. Garde*, 5. 93.; and *Carth.* 141. *Rice v. Langford.*

(t) *Co. Litt.* 12. b.

(u) *Co. Litt.* 12. b. and *ante*, p. 171. (u).

heirs

heirs *on the part of his mother* ; and the rent shall follow such reversion as its incident: but when the grant was *in fee*, there was *no* such reversion to which it could attach; and, consequently, it must be considered substantively as a *new estate*. [184]

So if A. having a lease to her and her heirs for lives, devise it to her daughter, and afterwards the lease be renewed; this last is *a new lease*, and, as such, shall descend to the heirs on the part of the father (x). Lease for lives.

Thirdly, as to A FINE.

Fine.

A FINE *levied* BY TENANT IN TAIL affects *not the reversion or remainders over*, WHEN IN ANOTHER PERSON (y).¹

But if HE HAS THE FEE IN HIMSELF,

(x) *Precedents in Chancery*, 319. *Mason v. Day*; and 1 *Atk.* 480. *Pierson v. Shore*.

(y) (So they claim within the time prescribed.)
1 *Cruise*, 208. *Co. Litt.* 372. a.

the fine extinguishes the estate tail, and brings the reversion into possession (z).

[185] And, consequently, this being *the old fee*, if it had descended *ex parte materna* before the levying of the fine, it must do so afterwards ; as the fine does not affect it otherwise than by bringing it into possession :

(z) 1 *Cruise*, 274. *Carth.* 257. 261.

But this must be understood of a fine *with proclamations*: for a fine *without* proclamations, though it will work a discontinuance, will not destroy an estate tail. See 3 *Co.* 86. a. *Bull. N. P.* 229. 1 *Cr.* 151.

Though a fine shall be intended to have been levied with proclamations till the contrary be shown. 3 *Co.* 86. b.

But if this intendment be rebutted, then it will be necessary to *prove* the proclamations, (as they must be proved to bar a stranger). *Bull. N. P.* 229.

And note; that the statute 4 *Hen.* 7. c. 24. does *not* extend to fines levied in courts of ancient demesne; and, therefore, though fines levied there will cause a discontinuance, they will not bar an entail, unless by special custom. 1 *Salk.* 339. *Hunt v. Bourne.* *Jenk. Cent.* 87. pl. 68. *Cruise on Fines*, 93, 175. 2 *Watk. Copyh.* 41. [43. 2d ed.]

Unless

Unless it be A FINE SUR DONE, GRANT, ^{Grant & Render.} & RENDER: *for if a person, seised EX PARTE MATERNA, levy SUCH FINE, it will operate as a feoffment and re-enfeoffment, and give him A NEW ESTATE; which shall, consequently, descend to his heirs ON THE PART OF HIS FATHER (a).*

But it must be observed that, although on a fine *sur done, grant, & render*, the uses rendered to the cognizor are new uses, because the estate has passed to the cognizee; yet, as such fine is a double fine, comprehending the fine *sur cognizance de droit comè ceo*, &c. and that *sur concessit*, the cognizee takes his estate by the fine *sur cognizance*, &c. and the estate or uses so rendered by him, is a portion of, or are served by, *that* estate; and, therefore, in case such estate be not wholly rendered to the cognizor or a stranger, but a part be also limited to the cognizee or his heirs, such part is a portion of the estate so

(a) *Carth.* 140. *Rice v. Langford.* *Dyer*, 311. pl. 84.

taken on the fine *come ceo*, &c.; and, consequently, the uses so limited on the fine *sur concessit* to the cognizee or his heirs, are not new uses, but must be considered as his old reversion: as if a fine be levied to baron and feme and the heirs of the baron, and they grant and render, by the same fine, the same tenements to the cognizor for the term of the life of the baron, remainder to a stranger for life, with remainder to the heirs of the baron; the heirs of the baron shall take by descent, and not by purchase; the portion, so ultimately limited, continuing in the baron as his reversion, and not rendered by the cognizor, as the estate taken by him is rendered by the cognizee (b).

So if the render be in tail, (*i. e.* of a portion only of the estate,) the cognizee shall have the reversion to his own use (c).

(b) See *Dyer*, 237. *pl.* 31. *Bromley v. Bennet*; and *Pasch.* 15 *Ed.* 3. there cited.

(c) See *Moore*, 46. *pl.* 138; *per Dyer*, *quod Benlous & auters Sergeants Concesserunt*.

The fine *sur done, grant, & render*, is, *Sur cognizance, &c.* however, THE ONLY SORT OF FINE which gives A NEW ESTATE: for if a person, seised *ex parte materna*, levies a fine *sur cognizance de droit, come ceo, &c.* and either makes no declaration of the uses, or declares it to be to the use of himself and his heirs, the lands will still descend *ex parte materna*; because it is still *the old use*; which, consisting in trust and confidence, will follow the nature of the land, and will descend as the land would have descended if no alteration had been made: and it is totally immaterial whether the use be expressly declared upon such fine, [186] or permitted to rise by implication (*d*).

Fourthly, as to A RECOVERY.

Recovery.

A common recovery is now considered merely as “a form of conveyance,” or *Is a common assurance.*

(*d*) 1 *Cruise*, 71. And see also *Carth.* 140—1.; *Chetwynd on Fines*, sec. 12. p. 84. and *Barnes*, 467. *Armstrong d. Neve & al. v. Woolsey & al.*

common

Use.

common assurance (e); and, therefore, if no uses be declared, nor any raised to the recoveror, its operation is the same, as to this point, as a feoffment or fine. Each of these conveyances passes a fee (f); but the fee effected by either is immediately to the use of the person conveying (if such appears the intention of the parties (g)—); and as he is thus *in* of his *ancient use*, and the statute uniting the possession to it, he is considered as *in* of his *OLD ESTATE*; and, consequently, the descent remains as before.

[187]

By tenant in fee.

Thus if a person, seised ex parte matris IN FEE, suffers a recovery, and no uses be declared, nor any consideration appear to raise them to the recoveror, THE USE RESULTS; or if the uses be declared to the recoveree and

(e) See 1 Wils. 73. 1 Burr. 115, 116. 1 Co. 15. b. Cro. Jac. 643. pl. 3. Hob. 28.

(f) See 1 Burr. 92.; and *ante*, Of Feoffment and Fine, p. 179. 184.

And see Hob. 322—3.

(g) See Gilb. Rep. 17. and note; and Dougl. 26. *his*

his heirs, he is in of HIS OLD ESTATE, which shall continue to descend as if no recovery had been suffered (h).

But, if A TENANT IN TAIL, seized by ^{By tenant in tail.} descent ex parte materna, suffer A RECOVERY, the fee effected by such recovery shall descend to his heirs ON THE PART OF HIS MOTHER: but if he took THE ESTATE TAIL by PURCHASE, or BY DESCENT EX PARTE PATERNA, the fee so effected shall go to his heirs ON THE PART OF HIS FATHER: and this whether the lands be freehold or copyhold (i). [188]

(h) 1 *And.* 127. pl. 173. Dowlman's case. *Hob.* 27. 9 *Co.* 7. b. Dowman's case. *Dyer*, 146. pl. 70, 71. Villers & Beaumont. 2 *Brownl.* 171. Rowles v. Osborne. *Cro. Jac.* 643. Ferrers & al. v. Fermor & al. *Gilb. Rep.* 16. 18. 1 *Atk.* 9. in Stapilton v. Stapilton. 9 *Mod.* 172. Lord Derwentwater's case, 1 *Wils.* 74.

(i) 1 *Wils.* 66. Martin d. Tregonwell v. Strachan & al. 4 *Brown's Ca. in Parl.* 486. S. C. 5 *Durnf. & East*, 104. Roe d. Crow v. Baldwere & al.

If

[190]
One convey-
ance.

If a fine and recovery be for a particular purpose, the several deeds, fine, and recovery, shall be considered as ONE CONVEYANCE, and neither be permitted, by its peculiar properties, to operate to the destruction of the intent of the parties (*k*).

As where baron and feme covenanted to levy a fine of lands descended to the feme from her mother, which was levied accordingly, and a recovery afterwards suffered; it was held, that the deed, fine, and recovery made but one conveyance; that the estate moved originally FROM THE COGNIZOR, (which, in this case, was the

16. *Vin.* 138.
One entire
conveyance.

(*k*) 2 *Co.* 75. *Cromwell's case.* 3 *Atk.* 748. *Parsons v. Freeman.* *Gilb. Rep.* 17. *Lord Altham v. Earl of Anglesea.* *Cro. Jac.* 643. *Sir John Ferrers & al. v. Sir Richard Fermor & al.* 2 *Burr.* 1131. *Selwyn v. Selwyn.* 1 *J. Blackst. Rep.* 222. 251. *S. C.*; and 1 *Ibid.* 605. *Roe d. Noden v. Griffith.* 5 *Burr.* 2787. *Vaughan d. Atkins v. Atkins.*

feme):

feme (l)—: and that what the cognizor had not parted with was still in such cognizor; and, therefore, so much as was not declared of the uses upon the recovery was still to *the old use*; the nature of the common recovery being but as an instrument for raising the use (*m*).

[191]

And lastly, *when the LEGAL ESTATE descends in fee-simple ex parte materna, and the EQUITABLE ESTATE ex parte paterna, or vice versa, THE EQUITABLE ESTATE SHALL MERGE IN THE LEGAL; and both shall follow the line through which the LEGAL estate descended (n).*

Merger of the equitable estate in the legal,

By descent of the legal fee;

So

(*l*) 2 Co. 57. b. Beckwith's case; 77. b. Cromwell's case; and *Dougl.* 44, 45. *Hurd v. Fletcher & al.*

(*m*) *Abbot v. Burton*, 11 *Mod.* 181.; and in 14 *Vin. Abr.* Heir, (W. 2.) *pl.* 6. *Com. Rep.* 160. S. C.; and see 5 *Com. Dig.* 582. Uses; (D. 2.) and 2 Co. 58. b.; and *Cro. Jac.* 643. *pl.* 3.

(*n*) *Dougl.* 771—780. *Goodright lessee of Alston v. Wells & al.* 1 *Brow. Ch. Ca.* 363. *Wade v. Paget.* 3 *Ves. Jun.* 126. *Philips v. Brydges*; and *Ibid.* 339. *Selby v. Alston.*

So

By purchase.

[192] So also if the equitable estate had descended *ex parte materna*, and the heir had the *legal* estate BY PURCHASE, the equitable estate would merge and be utterly extinguished in the legal; which would, of course, go to the heirs *on the part of the father (o)*.

*Paternal
heirs pre-
ferred.*

And, by WILLES, J. "when the question is between those of the paternal and

So the possession of lands was incompatible with an use issuing out of them; and, therefore, on the *cestuy que use's* accession to the lands, the use ceased, and was absorbed in the legal estate. *Plowd.* 44.

And it is said that, if one have *lands* on the part of his father*, and a *rent out of the same lands* on the part of his mother, the rent will become extinct; and cannot be revived or divided, though he die without issue. 18 *Viner*, 495. *Rent*, (T.) pl. 9. See *Co. Litt.* 149. b.

(o) *Dougl.* 771. *Goodright d. Alston v. Wells & al.* and *Doe d. Balch v. Putt, or Pott*, cited; and *ante*, 182.

* In fee:—For if tenant for life purchase a rent in fee, it will only be suspended during his life. See *Lib. Assi.* 209. b. pl. 15.

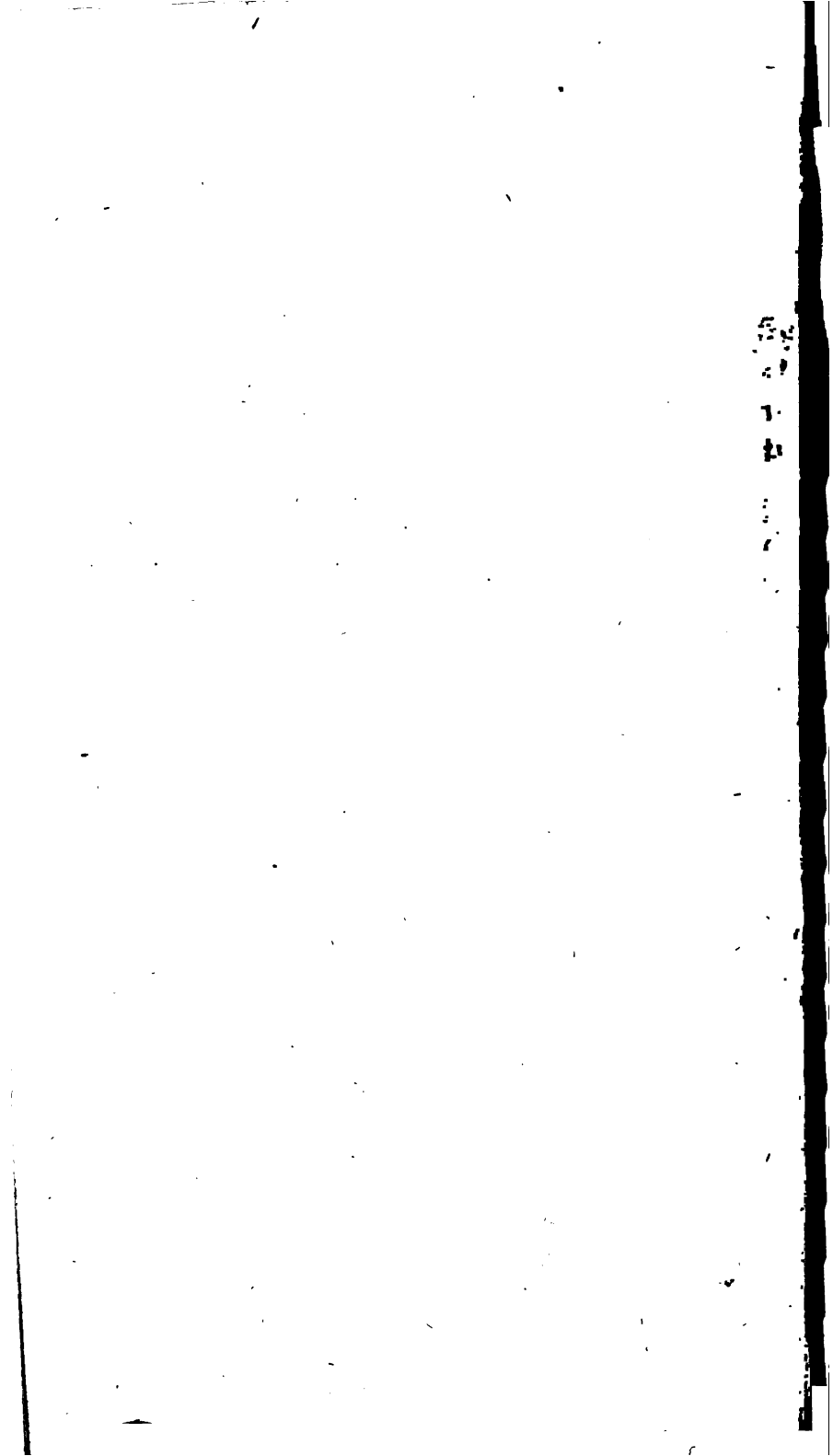
those

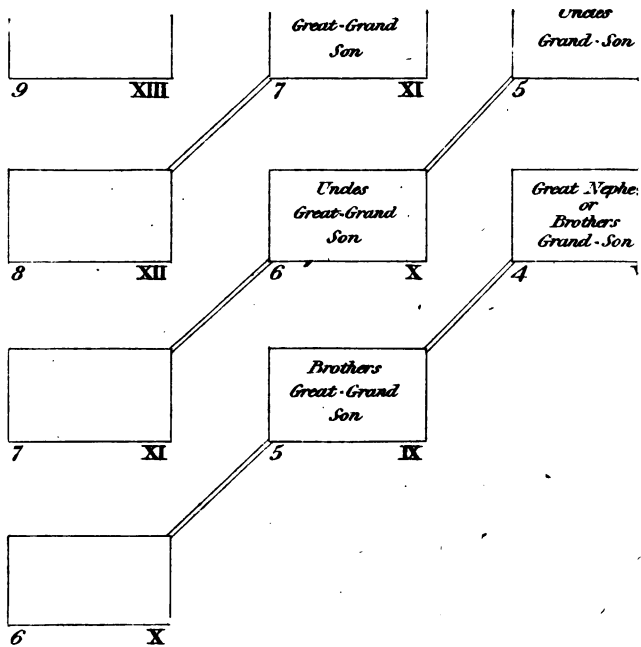
those of the maternal line, the law always gives the preference to *the former* (p)."

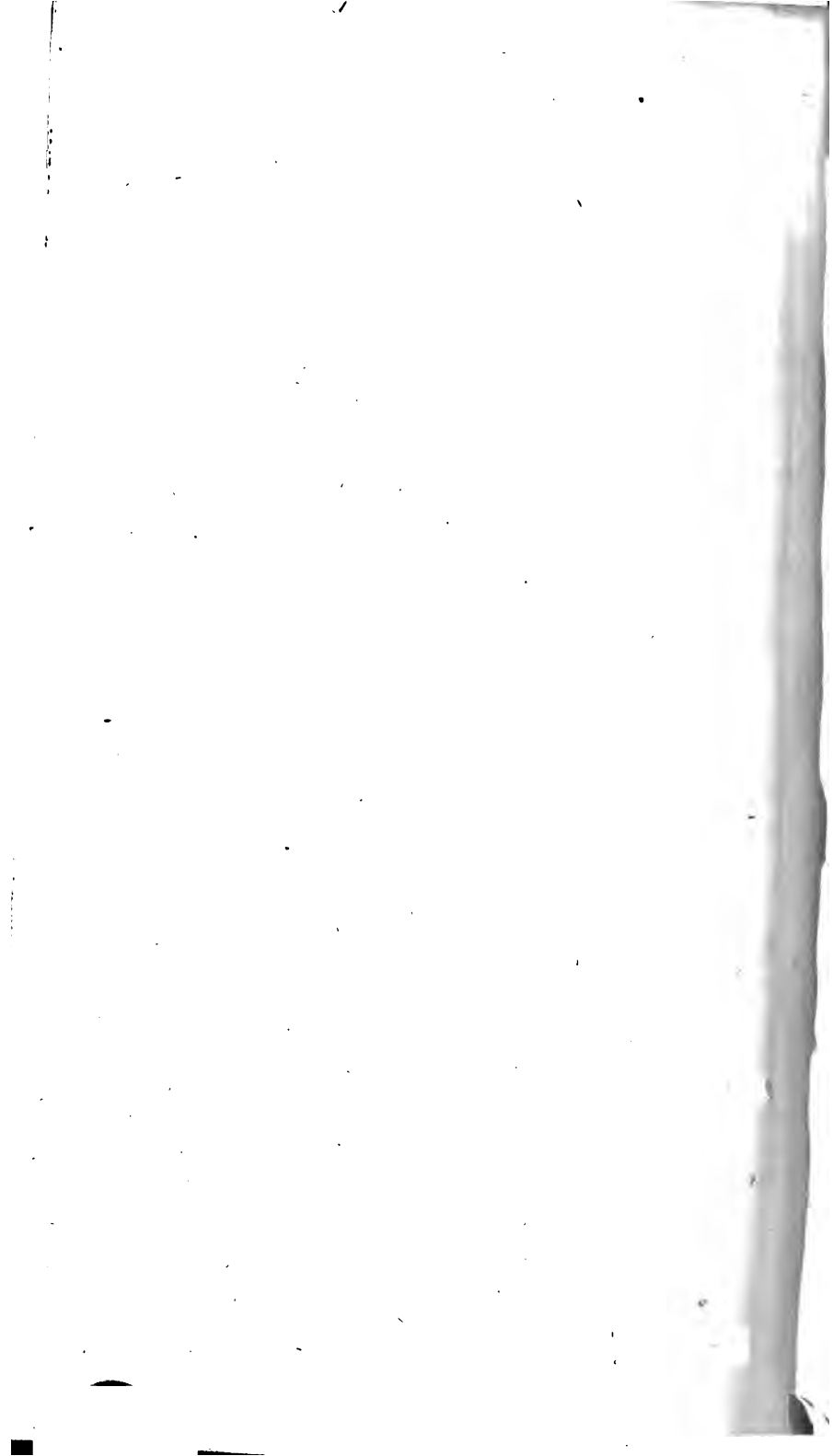
And, by BULLER, J. as "where two *Two titles.* titles unite, the party shall be in of the best," and as the clear *legal* fee-simple is, in these cases, the best, the party shall therefore be in of it (q).

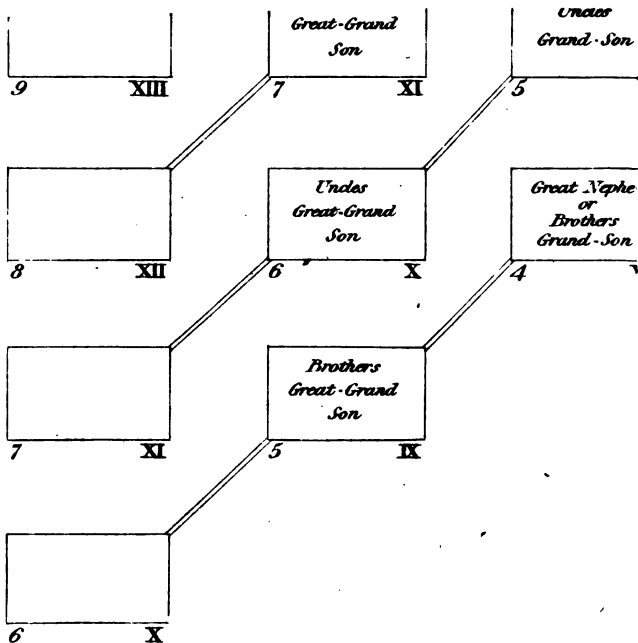
(p) *Dougl.* 778.

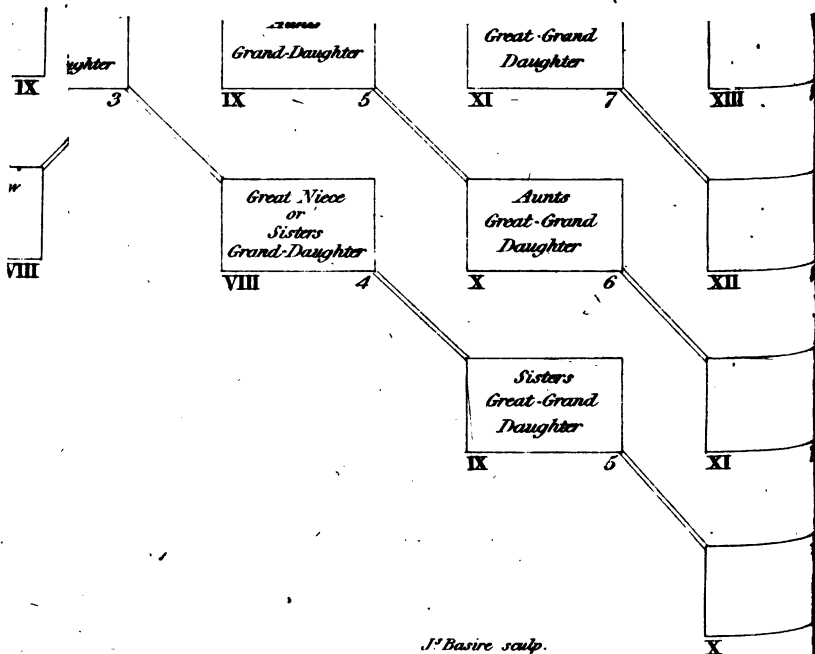
(q) *Ibid.* 779.











J^e Basire sculp.

to face page 305.

APPENDIX.

Of the Distribution of the Personal Effects of an Intestate.

IF the intestate leave a widow and ^{Wife.} children, the widow shall take a third part of the surplus of his effects. If he leave no children, she shall have a moiety (a).

But the statute does not extend to ^{Husband.} the estate of a *feme covert*; and, there-

(a) *Stat. 22 & 23 Car. 2. c. 10. s. 5, & 6.*

And note; the widow takes as widow, by the express words of the statute, and not as being of kin; for a wife is (as such) of no kin to her husband. See 3 *Atk.* 761. *Worsley v. Johnson.*

fore, the husband is entitled to her effects (b).

Children.

- If the intestate leave children, his effects, (i. e. the whole if he leaves no widow, or two-thirds if he does leave one,) shall be equally divided among his children (I) (c); whether male or female; whether by the same or different wives (d); whether posthumous or born in his lifetime (e); whether papist or protestant (f). Or, if he leave but one child, to such only child (g).

(b) *Stat.* 29 *Car.* 2. c. 3. s. 25. 2 *Bl. Comm.* 515. ch. 32. 1 *Pr. Wms.* 379. *Squib v. Wyn.* 3 *Atk.* 526. *Elliot v. Collier.*

(c) *Stat.* 22 & 23 *Car.* 2. c. 10. s. 5.

(d) For the half-blood shall take equally with the whole. *Carth.* 51. *Brown v. Farndell & al. Show. Parl. Cas.* 108. 110. *Watts & al. v. Crooke. Bunbury,* 158. *Janson v. Bury;* and *Wale v. Theedham,* there cited. And see 1 *Vern.* 404 & 435. *Earl of Winchelsea v. Norcliff, &c.*

(e) 2 *Atk.* 115. *Wallis v. Hodson & Ur.* 1 *Ves.* 156. *Burnet v. Mann.* And 2 *Freem.* 230. *Ball v. Smith.*

(f) 3 *Pr. Wms.* 49. *D'Avers v. D'Ewes.*

(g) *Præc. Chanc.* 21. *Palmer v. Garrard. Carthew,* 52. *Brown v. Farndell.* 3 *Pr. Wms.* 49. note (D). *D'Avers v. D'Ewes.*

If

If *some* of the children of the intestate die in his life-time leaving children, such children shall stand *in loco parentis*, and shall take their deceased parent's share (*h*): as if there be two sons, and one die leaving three children, and the other survive the intestate; the three children of the deceased son shall have one moiety, and the surviving son the other

Representatives among descendants.

And this right of representation among the descendants of the intestate is not confined within any degree (*i*).

But if *all* the children of the intestate die in his life-time leaving children, then the distribution shall be (II) to them (such issue) *per capita*; they now claiming in their own right, and not by representation. For where *all* the parents are deceased, their children take *per capita*; but when *some only*, they take *per stirpes* (*k*).

Taking *per capita*, or *per stirpes*.

Grand-children. (II)

And

(*h*) Stat. 22 and 23 Car. 2. c. 10. s. 5.

(*i*) See the Stat. and post. (*m*).

(*k*) Prec. Chanc. 54. Walsh v. Walsh. 2 Ves. 215.

Hotchpot. And note; when distribution is made among children, they must bring **their** advancement into hotchpot, as by the act is directed (*l*).

Great-grand-children. If there be no grandchildren surviving the intestate, then the great-grandchildren (III) shall take equally *per capita*; and so on; the lineal descendants of the intestate *in infinitum*, being preferred to all ascendants or collaterals (*m*).

Father. If the intestate leave no children, or representatives of them, the father (IV), if living, shall take in exclusion of the mother, brothers, and sisters, &c. (*n*).

in the case of Lloyd *v* Tench. 3 *Pr. Wms.* 50. in the case of D'Avers *v* D'Ewes. 1 *Pr. Wms.* 459. Bower *v*. Littlewood. 1 *Atk.* 454. Durant *v*. Prestwood. 2 *Black. Comm.* 517. ch. 32.

(*l*) *Stat.* 22 & 23 *Car.* 2. c. 10. s. 5.

(*m*) See the *Stat. Car.* 2. 1 *Com. Dig.* 273. Administration, (H.) cites *Raym.* (Sir Thomas), 500. 1 *Pr. Wms.* 27. 1 *Atk.* 457, 458. 2 *Pr. Wms.* 346.

(*n*) 2 *Bla. Comm.* 516. ch. 32.

If

If the father be dead, the (V) mother, Mother and brothers and sisters. brothers and sisters of the intestate, shall (V) take equally (o): as if there be a mother and four brothers or sisters, each shall take a fifth (p).

So if some, or all, of such brothers or Representatives. sisters die, leaving children, such children shall stand *in loco parentis*: as if there be a widow, mother, and the children of a deceased only brother, the widow shall take her moiety, and the mother and the children of the brother shall have each a fourth; *i. e.* the mother one fourth, and the children the other; for the children take *quasi* by representation (q).

But this right of representation, being Among collaterals

(o) *Stat. 1 Jac. 2. c. 17. s. 7. 2 Bl. Comm. 516. ch. 32.*

(p) See 1 *Strange*, 710. *Keilway v. Keilway*. 2 *Pr. Wms.* 344. S. C.

(q) See *Stat. 1 Jac. 2. c. 17. s. 7. 2 Pr. Wms.* 344. *Keilway v. Keilway*. 1 *Atk.* 455. *Stanley v. Stanley*.

among *collaterals*, shall not extend further than brothers or sisters children (*r*).

Mother
alone.

If there be no brother, sister, or descendant of such brother or sister, the mother shall take the whole; she having been entitled before the statute 1 *Jac.* 2., though there *were* brothers or sisters; and that statute does not take away her right but only as to them and their issue (*s*): for to a *grandson* of a brother, who must claim in his own right, the mother shall be preferred (*t*).

Mother-in-
law alone.

But note; a *mother-in-law* shall take nothing (*u*).

(*r*) 1 *Atk.* 457. *Stanley v. Stanley*.

(*s*) See the *Stat.* and 2 *Black. Comm.* 516. ch. 32. 11 *Viner*, 196. (Executor, Z. 12.) *Jackson v. Prudhome*. 1 *Atk.* 457. *Stanley v. Stanley*.

(*t*) See the *Stat.* and *post*. And see also 1 *Atk.* 457. *Stanley v. Stanley*.

(*u*) 2 *Pr. Wms.* 216. *Duke of Rutland v. Duchess of Rutland*.

If

If there be no mother, the brothers and sisters take equally; their children standing in *loco parentis* (x). But note; representation among collaterals ends with such children: for if there be a brother's grandson and a sister's son, the sister's son shall exclude the grandson, who shall take nothing (y). So a living uncle shall exclude a deceased uncle's son (z).

Brothers and sisters, where no mother.

If there be neither brother nor sister, nor children of a brother or sister, then distribution shall be made, without preference, to those, whoever they may be, who are next in degree of kindred to the intestate.

Next of kin.

And the degrees of kindred shall be computed according to the civil law (a).

According to the civil law.

(x) See the *Stat. Car.* 2.

(y) 1 *Pr. Wms.* 25. *Pett's case.* *Comyns's Rep.* 87. S. C. 1 *Lord Raym.* 571. S. C. and see *post*.

(z) See *post*. p. 313.

(a) *Prec. Chanc.* 593. *Mentney v. Petty.* 2 *Atk.* 117. *Wallis v. Hodson.* 1 *Ves.* 334. *Thomas v. Ketteriche.* 2 *Bla. Comm.* 504. 515. ch. 32.

Paternal and
maternal
lines.

And if there are relations both on the father's and mother's side, in equal degree, they shall take together (b).

Grandfather.

(VI)

If there be neither brother nor sister, nor children of a brother or sister, the grandfather, (or the grandmother, if he be dead,) shall next take (VI). For although the grandfather is in equal degree with the brother or sister, yet *they* shall always take first and exclude *him* (c).

But, if there be children of brothers or sisters, who do not claim by representation but in their own right, (as where *all* the brothers and sisters, and mother also (see page 309, are deceased,) the grandfather shall be preferred; he being nearer in degree. For, as the grandfather is nearer than the uncle, and, there-

(b) 1 *Pr. Wms.* 53. *More v. Barham* (cited). 1 *Com. Dig.* 273. Administration, (H). cites *Raym.* (*Sir Thomas*), 500.

(c) See 3 *Atk.* 762. *Evelyn v. Evelyn*; and S. C. more fully in *Burn's Eccl. Law*, 348. And see the case of *Pool v. Wilshaw*, cited in 1 *Ves.* 330. 335.

fore,

fore, shall exclude him (*d*); so, as the nephew, or brother's child, is in the same degree as the uncle (*e*), the grandfather must, for the same reason, exclude him (the nephew) also (*f*).

If there be no grandfather, then the great-grandfather (or great-grandmother, if he be dead,) uncles, aunts, nephews, and nieces, (or brothers or sisters children claiming in their own right,) shall (VII) take together; being in equal degree (*g*).

Great-grandfather, or great-grandmother, uncle, aunt, nephew and niece.

(VII)

For the living uncles and aunts shall exclude the children of deceased uncles and aunts; such children being too remote to claim *by representation*; and, if

(*d*) *Prec. Chanc.* 527. *Woodroffe v. Wickworth.* *Ibid.* 593. *Mentney v. Petty.* 1 *Pr. Wms.* 41. *Blackborough v. Davis.* 1 *Lord Raym.* 684. S. C.; and see 1 *Ves.* 215. *Lloyd v. Shore.*

(*e*) 1 *Atk.* 454. *Durant v. Prestwood.*

(*f*) See 2 *Ves.* 213. *Lloyd v. Tench.*

(*g*) *Preced. in Chanc.* 593. *Mentney v. Petty.* 1 *Atk.* 454. *Durant v. Prestwood.* 2 *Ves.* 213. *Lloyd v. Tench.*

considered

considered as claiming *in their own right*, they are a degree further from the intestate (*h*): as the nephews, or nieces, or children of brothers or sisters, shall exclude the grandchildren of such brothers or sisters when claiming in their own right ; as before observed (*i*).

Great-great-grandfather, or mother, great-uncle, first-cousin, and great-nephew.

(VIII)

If there be neither great-grandfather, uncle, aunt, nephew, or niece, then the great-great-grandfather, (or great-great-grandmother, if he be dead,) great-uncle, first-cousin, (or uncle's son,) and great-nephew, (or brother's grandson, claiming in his own right, and not by representation,) shall (VIII) take together; being in equal degree (*k*).

And note; that the distribution is not to be made till a twelve-month after the

(*h*) 1 *Pr. Wms.* 594. *Bower v. Littlewood.* *Proc. Chanc.* 28. *Man v. Harding.* 11 *Viner*, 195. *Executor*, (Z. 11.) *pl.* 15.

(*i*) P. 311.

(*k*) See 1 *Ves.* 333. *Thomas v. Ketteriche.*

intestate's

intestate's decease ; (see the *Stat.*) yet the interest vests immediately (*l*) in the person entitled, (saving as to a posthumous claimant) : so that if he die within the year, his share shall go to his representative (*m*).

And note also ; that, after the children of brothers and sisters, distribution must always be made *per capita* among collaterals (*n*).

(*l*) *i. e.* On the death of the intestate ; *Carth.* 52. 1 *Vern.* 403. *Earl of Winchelsea v. Norcliff, &c.* For if a person had a brother and sister, and the sister had married and died before the intestate, the husband of the sister shall not take any thing.

(*m*) 2 *Pr. Wms.* 442. *Edwards v. Freeman.* 3 *Pr. Wms.* 49. note (D.) *Grice v. Grice.* *Carth.* 52. *Brown v. Farndell & al.*

(*n*) *Comyns's Rep.* 87. *Pett v. Pett.* 1 *Lord Raym.* 471. S. C. 1 *Pr. Wms.* 25. S. C. 1 *Ibid.* 593. *Bowers v. Littlewood.* *Prec. Chanc.* 28. *Maw v. Harding.* *Ibid.* 54. *Walsh v. Walsh.* 3 *Pr. Wms.* 50. *D'Avers v. D'Ewes.*

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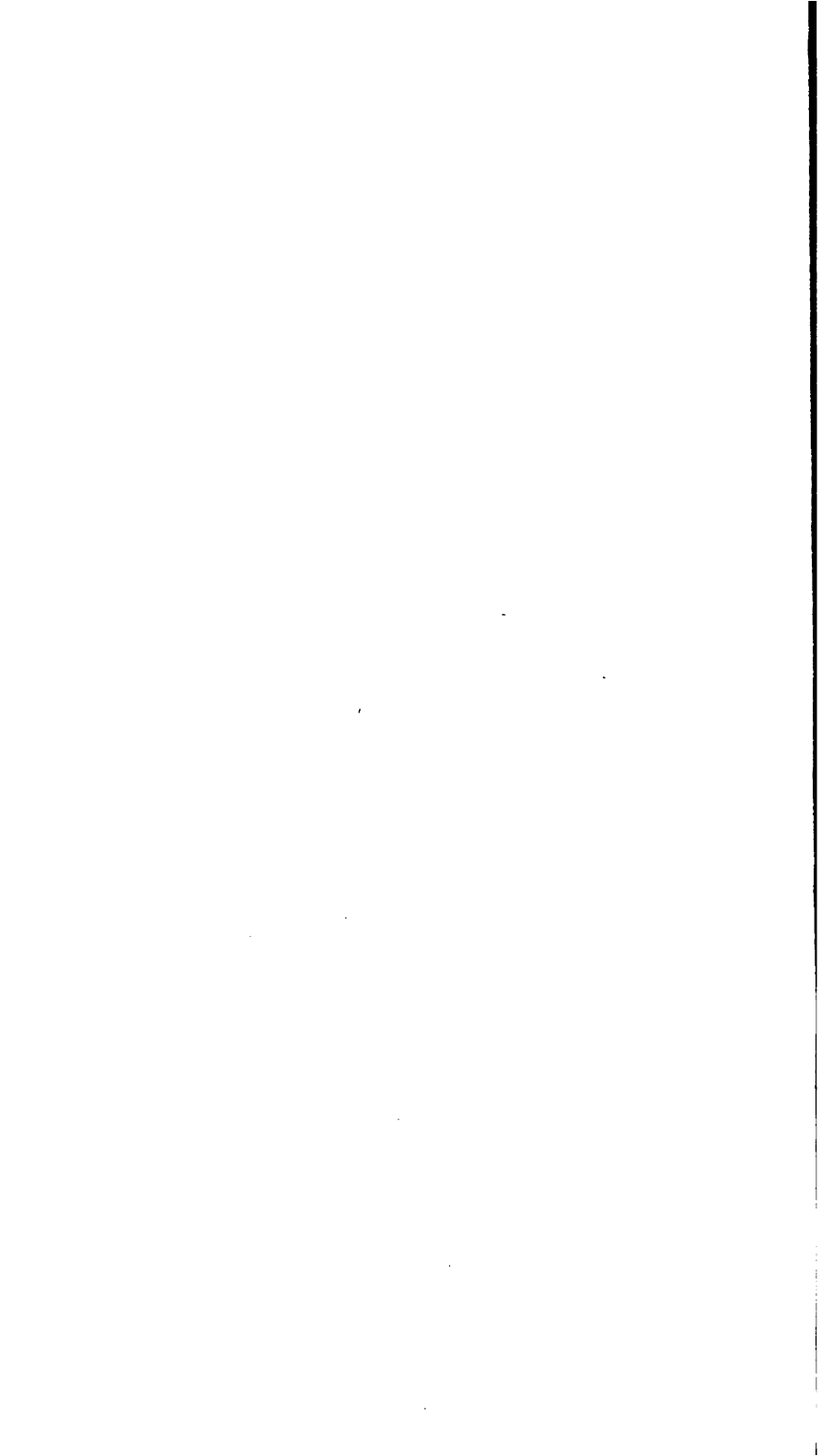
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